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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MEDFORD ASSEMBLY OF GOD,

Petitioner,

v.

CITY OF MEDFORD, OREGON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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QUESTIONS PRESENTED

A church, properly zoned as such, lawfully operated a day care, preschool, and kindergarten ministry for 128 children as an "accessory church use" and thus permissible under the zoning code. The City, however, ordered the church to obtain a conditional use permit, or face closure, for a school ministry in the same building for 16 first through third graders because this was not deemed an "accessory church use."

1. Do the Religion Clauses of the First Amendment prohibit a city government from segregating various ministries of a church for zoning purposes based on the content of what is taught?

2. Do the Religion Clauses of the First Amendment prohibit a city from demanding that a church obtain a separate zoning permit to operate a school ministry in a building properly zoned as a church?

3. Did the Oregon Court of Appeals err by failing to follow this Court's decisions which hold that a church-operated school is an integral ministry of the church?

4. Did the City violate the Free Exercise Clause by insisting on a mechanistic application of the City zoning code rather than accommodating the religious practices of the church by seeking a less restrictive means of achieving its interest in land use regulation?

5. Was the church's right to equal protection under the law violated when the City permitted another church with the same fact situation to operate its school without an additional zoning permit?

6. Did the Oregon Court of Appeals err by requiring a showing of a First Amendment Violation before employing the "strict scrutiny test" under the Equal Protection

Clause even though a "fundamental freedom"—religion—was at issue?

PARTIES

All parties are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	11
I. The Oregon Court Of Appeals Decided The Federal Questions In This Case In A Way In Conflict With Other State Courts Of Last Resort	11
II. The Oregon Court Of Appeals Has Decided Important Questions Of Federal Constitutional Law Which Have Not But Should Be Decided By This Court	14
III. The Oregon Court Of Appeals Has Decided This Case In Direct Conflict With Principles Enunciated By This Court	17
A. The Oregon Court of Appeals Has Repeatedly Refused To Apply The Decisions Of This Court Regarding The Free Exercise Clause	17
B. The Oregon Court Failed To Consider The Decisions Of This Court Which Hold That Church-Related Schools Are Integral Ministries And Cannot Be Separately Regulated	19
C. The Oregon Court Failed To Consider The First Amendment Decisions Of This Court Regarding Zoning	23
D. The Oregon Court Failed To Properly Analyze The Equal Protection Issues Raised By The Church	25
CONCLUSION	28
APPENDIX	
Order of the Oregon Court of Appeals recalling judgment (August 21, 1985)	1a

Table of Contents Continued

	Page
Order of the Oregon State Supreme Court denying Petition for Reconsideration (July 2, 1985)	2a
Order of the Oregon State Supreme Court denying Petition for Review (May 21, 1985)	3a
Order of the Oregon Court of Appeals denying Petition for Reconsideration (April 19, 1985)	4a
Order of the Oregon Court of Appeals affirming the Land Use Board of Appeals (February 27, 1985)	5a
Final Opinion and Order of the Land Use Board of Appeals (October 4, 1984)	15a
Order and Opinion of the Oregon State Supreme Court (May 22, 1984)	29a
Order of the Oregon Court of Appeals denying rehearing (November 29, 1983)	32a
Order of the Oregon State Supreme Court Allowing Review (December 20, 1983)	33a
Order and Opinion of the Oregon Court of Appeals (October 5, 1983)	34a
Final Opinion (Order of Dismissal) of the Oregon Land Use Board of Appeals (July 15, 1982)	39a
Resolution No. 4541 of the Medford, Oregon City Council (January 21, 1982)	48a
Letter from the City of Medford Planning Department to Pastor Ravan (October 20, 1981)	52a
Resolution No. 4108 of the Medford City Council (July 3, 1980)	54a
Resolution No. 3950 of the Medford, Oregon City Council (January 17, 1980)	56a
Relevant Portions of the Medford Zoning Ordinance	58a
A Bill Entitled "An Act incorporating the Protestant Episcopal Church in the Town of Alexandria, in the District of Columbia" (1811)	61a
Veto Message from President James Madison (1811)	66a

TABLE OF AUTHORITIES

CASES: Page

Christian Retreat Center, 28 Or. App. 673, 560 P.2d 1100, *rev. den.* 1977 18

City of Concord v. *New Testament Baptist Church*, 118 N.H. 56, 382 A.2d 377 (1978) 13

Damascus Community Church v. *Clackamas Co.*, 45 Or. App. 1065, 610 P.2d 273, *rev. den.* 1980, app. dism. 450 U.S. 902 (1981) 7, 8, 10, 18

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 27

Everson v. *Bd. of Ed.*, 330 U.S. 1 (1947) 14

F. S. Royster Guano Co. v. *Virginia*, 253 U.S. 412 (1920) 25

Grand Rapids v. *Ball*, ___ U.S. ___, 87 L.Ed.2d 267 (1985) 19, 20, 22

Jehovah's Witnesses v. *Mullen*, 214 Or. 281, 330 P.2d 5 (1958); *app. dism.*, 359 U.S. 436 (1959) 18

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) ... 19, 20, 21, 22

Lynch v. *Donnelly*, ___ U.S. ___, 79 L.Ed.2d 604 (1984) 14

Marsh v. *Chambers*, 463 U.S. 783 (1983) 14

Medford Assembly of God v. *City of Medford*, 64 Or. App. 815, 669 P.2d 1161 (1983), aff'd. 297 Or. 138, 681 P.2d 790 (1984) ..... *passim*

Meek v. *Pittenger*, 421 U.S. 349 (1975) 20

NLRB v. *The Catholic Bishop of Chicago*, 440 U.S. 490 (1979) 20, 21, 22

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 16

Plyer v. *Doe*, 457 U.S. 202 (1982) 27

Police Dept. v. *Mosley*, 408 U.S. 92 (1972) 24, 27

St. Martin Evangelical Lutheran Church v. *State of South Dakota*, 451 U.S. 772 (1981) 22

San Antonio Ind. Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973) 25, 27

Schad v. *Borough of Mt. Ephraim*, 452 U.S. 62 (1981) 23

Seward Chapel, Inc. v. *City of Seward*, 655 P.2d 1293 (Alaska 1982) 13

Table of Authorities Continued

Page

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 27
Sheldon v. *Tucker*, 364 U.S. 479 (1960) 12
Sherbert v. *Verner*, 374 U.S. 398, (1963) 12, 19
Sumner v. *First Baptist Church*, 97 Wn. 2d1, 639 P.2d 1358 (1982) 12
Thomas v. *Review Bd.*, 450 U.S. 707 (1981) 12, 19
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 12, 19
Woolley v. *Maynard*, 430 U.S. 705 (1977) 13

CONSTITUTION

First Amendment ..... *passim*
Fourteenth Amendment ..... *passim*

BOOKS

S. Padover, *The Complete Madison*, Harper and Brothers, 1953 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ____

MEDFORD ASSEMBLY OF GOD,

Petitioner,

v.

CITY OF MEDFORD, OREGON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon, entered in this proceeding on February 27, 1985.

OPINIONS BELOW

The order of the Oregon Court of Appeals recalling the Appellate Judgment on August 21, 1985, pending disposition of a petition for a writ of certiorari to the United States Supreme Court appears at Appendix 1a. The order of the Oregon Supreme Court denying review of the petition for reconsideration dated July 2, 1985, appears at Appendix 2a. The order of the Oregon Supreme Court denying review on May 21, 1985, appears at Appendix 3a, 700 P.2d 251 (1985). The order by the Oregon Court of Appeals denying reconsideration on April 19, 1985, appears at Appendix 4a. The opinion of the Oregon Court

of Appeals filed February 27, 1985, appears at Appendix 7a, 695 P.2d 1379 (1985). The Final Opinion and Order of the Land Use Board of Appeals (LUBA) filed on October 4, 1984, appears at Appendix 15a.

This case has also been up and down the Oregon courts on procedural grounds. The decision of the Oregon Supreme Court filed May 22, 1984, appears at Appendix 29a, 297 Or. 138, 681. The order of the Oregon Court of Appeals denying rehearing dated November 29, 1983, appears at Appendix 32a. The order of the Oregon Supreme Court allowing review dated December 20, 1983, appears at Appendix 33a. The decision of the Oregon Court of Appeals dated October 5, 1983 appears at Appendix 34a, 64 Or. App. 815, 669 P.2d 1161 (1983). The Final Opinion (Order of Dismissal) of the Land Use Board of Appeals (LUBA) dated July 15, 1982, appears at Appendix 39a. Resolution No. 4541 of the Medford City Council dated January 21, 1982, appears at Appendix 48a. The letter from the City of Medford Planning Department to the First Assembly of God Church, dated October 20, 1981, appears at Appendix 52a. Resolution No. 4108 of the Medford City Council dated January 17, 1980, appears at Appendix 56a. Resolution No. 3950 of the Medford, Oregon City Council, dated January 17, 1980, appears at Appendix 57a. The Medford Zoning Ordinance appears at Appendix 58a.

JURISDICTION

The Oregon Supreme Court denied a petition for reconsideration of this case on July 2, 1985 (Appendix 2a). The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

U.S. Constitution, Amendment XIV:

". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

City of Medford, Oregon, zoning ordinance, 10-165, in pertinent part:

> *High Density Multiple-Family District, or R-4 District.*
>
> (1) Purpose. This district is intended to provide for high density multiple-family residential developments in locations close to shopping and services, transportation or public open space, and, in appropriate locations, a transitional use area between residential districts and other less restrictive districts.
>
> (2) Permitted uses. The following are permitted:
>
> * * *
>
> (e) Churches subject to the requirements of Section 10-245 (5).
>
> * * *
>
> (3) Accessory uses. The following accessory uses are permitted:
>
> * * *
>
> (f) Other accessory uses and accessory buildings and structures customarily appurtenant to a permit-

ted use, but fences shall comply with Section 10-245 (19).

(4) Conditional uses. The following conditional uses may be permitted subject to a conditional use permit:

(a) Public, parochial, and private schools, including child care facilities, but not including business, technical, or similar schools.

STATEMENT OF THE CASE

Petitioner, Medford Assembly of God Church,[1] operates as a part of its church ministry a day care center, preschool, kindergarten, and elementary school on church premises during the week. The church has an average attendance on Sunday mornings of approximately *700 persons*. It also has services on Sunday evening.

At the time this case arose, the day care, preschool, and kindergarten had a combined enrollment of *128 children* for this Monday through Friday ministry held in the church building. In the same building, the church also conducts school classes for first through third graders. At the time this case arose there were only *16 students* in the school.

In addition the church has a variety of other mid-week programs including women's Bible studies, Wednesday night services and a variety of youth meetings all with significant numbers of persons in attendance.

The church considers its educational ministry (school) as an integral part of the church; it is a religious function ordained by God. The Assembly of God denomination holds that education and wisdom are inseparable from God. Petitioner's congregation, in accord with the tenets of the denomination, has a deep commitment to provide

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[1] Sometimes the church is referred to in the record as the First Assembly of God Church of Medford, Oregon.

education with a Biblical foundation to the young during the week as well as on Sunday. They believe the elementary school is an integral and inseparable religious ministry of the church, equivalent to Sunday school, evening service or Bible classes. The school is operated in the same building as the church, and is under the administrative leadership of the church. The church financially underwrites the school which could not survive based on tuition receipts alone. For practical, financial, and philosophical reasons, the school could not survive off the church premises.

Medford Assembly of God Church was originally constructed in 1951 and has operated as a church at its present location since 1952. The Medford City Zoning Ordinances were originally adopted in 1966. Before 1973, the church was a nonconforming use in a C-2 zoning district. In 1973 the church obtained approval of a zone change to R-4 for the main church premises located at 1108 West Main Street, Medford, Oregon, and for adjacent property used by the church at 25 and 29 Quince Street. The church is a permitted use in that zone.

Petitioner began operating a day care center on the church premises in 1972, a kindergarten in 1973, a preschool in 1978, the first and second grades in 1979 and the third grade in 1981. The only portion of these operations at issue in this proceeding are the elementary grades.

The sixteen students in the church school have a negligible land use impact, if any, when compared to the permitted church use.

In October of 1981, the respondent, the city of Medford, sought to require the church to obtain a conditional use permit for its church school.[2] The church was already

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[2] See letter dated October 20, 1981, set forth in full at App. 52a.

a permitted use in the high density multiple-family R-4 zone under the Medford zoning laws.

The zoning ordinance[3] provided that a church was permitted use within the R-4 zone. It also permitted "other accessory uses and accessory buildings and structures customarily appurtenant" to the permitted use. Public, parochial, and private schools, including child care facilities, were listed as conditional uses within the zone which required a special conditional use permit.

The City contends that since the zoning ordinance specifically denominates "parochial and private schools" as a conditional use, the church must obtain a separate conditional use permit for its school ministry. This is in effect requiring one building to get zoned twice. The City has not required this "double zoning" for the other weekday children's educational and child care programs. This is curious in light of the fact that the very same section which lists "parochial and private schools" also lists "child care facilities" as an additional conditional use requiring a special permit. The City has permitted without question the church to operate its weekday kindergarten, day care and preschool for 128 children during the 1981-1982 school year. Apparently, the City interpreted its ordinance to allow the day care, preschool and kindergarten as permitted accessory uses for the church. The City has emphatically contended that the classes for first through third grades are not permissible accessory uses.

While accepting zoning regulation for the church as a whole, petitioner declines to submit its individual religious activities for city licensing and to do so would violate their religious convictions.

The City has not always taken the position that church buildings must be zoned first as a church and then zoned

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[3] Medford City Ordinance 10-165.

again as a school in order to teach children during the week.

On January 17, 1980, Medford's city council adopted an ordinance which, in effect, was a declaratory judgment that the church school operated by another church, the Open Bible Standard Church, did not require a conditional use permit for a school. This ordinance stated, in part:

> "That the term 'church' as used in the Medford zoning ordinance includes a school meeting state compulsory attendance requirements as a part of the church premises; . . ."[4]

The city council held that the Open Bible Standard Church was operating such a school and that its operation was permitted under the church's original conditional use permit without further permit.[5] At that same time, Medford Assembly of God Church was also operating its school for first and second grade classes. It met the same definitional standards as the Open Bible Standard Church. The third grade was added in the fall of 1981 to accommodate the students promoted from second grade.

Subsequently the Oregon Court of Appeals reversed the trial court in the *Damascus Community Church* case.[6] Upon learning of this development, on July 3, 1980, respondent's city council adopted at a noon session, with-

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[4] The full text of the ordinance, Resolution 3950, is found at App. 56a.

[5] The City's action was apparently influenced by the trial court holding in *Damascus Community Church* v. *Clackamas County*, which is discussed below. The trial court had held that church schools were "accessory uses" for zoning purposes requiring no separate permit.

[6] 45 Or. App. 1065, 610 P.2d 273, rev. den. (1980), app. dismissed, 450 U.S. 902 (1981).

out public hearing, Resolution 4108,[7] in which the city council stated that it had reconsidered its previous interpretation of "church" in the light of *Damascus Comm. Church* v. *Clackamas County*, and had decided that it would no longer follow the interpretation of its prior resolution. However, it specifically exempted the Open Bible Standard Church by name from the change and allowed it to continue to operate its church school without requiring it to obtain a separate conditional use permit for the school apart from the church.

By letter dated October 20, 1981, respondent notified the Medford Assembly of God Church that it was in violation of the city zoning ordinance in that it was operating an elementary school on church premises without a conditional use permit. The church sought a staff opinion that a conditional use permit was not required and appealed adverse responses to the planning commission and city council pursuant to Section 10-275 of respondent's zoning ordinance.[8] On January 21, 1981, after a public hearing, respondent's city council adopted Resolution No. 4541,[9] which determined that its zoning ordinance required petitioner to obtain a conditional use permit for its church school. At that public hearing the church contended:

(1) that requiring the church to obtain a separate conditional use permit in order to teach the first through third grade violated its right to the free exercise of religion under the First and Fourteenth Amendments of the United States Constitution;

(2) that the city was in error by its failure to consider the school an accessory use to the church building;

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[7] The full text of Resolution 4108 is set forth at App. 54a.

[8] See, 10-275 at App. 59a.

[9] The full text of this resolution is printed at App. 48a.

(3) that the City had denied the church equal protection of the law by virtue of its disparate treatment of the Open Bible Standard Church.[10]

On February 17, 1982, petitioner filed with the Land Use Board of Appeals (LUBA) its notice of intent to appeal a land use decision of the City of Medford, Resolution 4541. On April 19, 1982, the Church filed a petition for review and petitioner's brief assigning as errors the same three arguments which had been made in the city hearing.

After oral argument on May 20, 1982, LUBA filed on July 15, 1982, its final opinion which dismissed the proceeding on jurisdictional grounds.[11] This procedural decision was reversed by the Oregon Court of Appeals which was affirmed by the Oregon Supreme Court which ultimately remanded the case to LUBA for a hearing on the merits. *Medford Assembly of God* v. *City of Medford*, 64 Or. App. 815, 669 P.2d 1161 (1983), *aff'd* 297 Or. 138, 681 P.2d 790 (1984).

After remand to LUBA, the filing of supplemental briefs and oral argument, which raised the same constitutional arguments as listed above, LUBA filed its final opinion and order on October 4, 1984, which affirmed the decision of the City of Medford which required a conditional use permit for operation of petitioner's school.[12] It found that requiring a permit did not violate constitutional religious freedoms or the Medford zoning ordinance. It also found that Medford First Assembly of God had not been denied equal protection of the laws under the Fourteenth Amendment by the disparate

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[10] Other grounds were argued relating to state law issues which are not repeated here.

[11] See text of the decision at App. 39a.

[12] The full text of the opinion and order begins at App. 15a.

treatment between itself and the Open Bible Standard Church.

On October 24, 1984, petitioner filed its Notice of Intent to Appeal and Petition for Judicial Review in the Oregon Court of Appeals. Briefs were filed and argued orally in that court. The Free Exercise and Equal Protection arguments were again raised by the church. The Court of Appeals issued its opinion on February 27, 1985, which upheld the city's requirement of the permit.[13]

The Oregon Court of Appeals held that it did not violate the freedom of religion provisions of the United States and Oregon Constitutions for the city to require petitioner to obtain a conditional use permit for their school. It cited, with only perfunctory discussion, its previous holding in *Damascus Comm. Church* v. *Clackamus Co.*, 45 Or. App. 1065, 610 P.2d 273, *rev. den.* 289 Or. 588 (1980), *appeal dismissed* 450 U.S. 902 (1981), as the basis of the disposition of the religious freedom issues.[14]

The Court of Appeals also held that by allowing the Open Bible Standard Church to operate a school without a conditional use permit and not allowing petitioner to do so, the city had not violated petitioner's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. The court applied the rational basis test to its equal protection analysis and found that the adoption of Resolution 3950 by the city established a rational basis for enforcing the ordinance differently with respect to the Open Bible Standard Church and other entities.

The court held that the strict scrutiny test was not applicable because petitioner's free exercise of religion "is

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[13] The full text of the opinion begins at App. 7a.

[14] App. 8a.

not affected by the application of the conditional use permit to the school."[15]

Petitioner then filed a Petition for Review in the Oregon Supreme Court. On April 19, 1985, the Oregon Court of Appeals treated the Petition for Review as a Petition for Reconsideration and denied the same.[16] The Oregon Supreme Court denied the Petition for Review on May 21, 1985.[17] The petitioner then filed a Petition for Reconsideration in the Oregon Supreme Court and the Supreme Court denied the same on July 2, 1985.[18] On July 24, 1985, petitioner filed a motion in the Oregon Court of Appeals moving for a stay of issuance of appellate judgment pending disposition of petitioner's petition for writ of certiorari to the United States Supreme Court. Said stay was granted by the Oregon Court of Appeals on August 21, 1985.[19]

REASONS FOR GRANTING THE WRIT

I. The Oregon Court Of Appeals Decided The Federal Questions In This Case In A Way In Conflict With Other State Courts Of Last Resort.

This Court has never directly passed upon the issues presented in this case, although as we demonstrate below, the Oregon Court of Appeals all but ignored the applicable general constitutional principles enunciated by this Court both as to the Religion Clauses and Equal Protection. However, three other state courts of last resort have directly considered cases with virtually identical factual patterns. Two state supreme courts, New

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[15] App. 14a.

[16] App. 4a.

[17] App. 3a.

[18] App. 2a.

[19] App. 1a.

Hampshire and Washington, have ruled in favor of the church's position that the Free Exercise Clause prohibits a local zoning ordinance from demanding that a church obtain a separate conditional use permit to operate a church-related school in the same building. The third state court, the Supreme Court of Alaska, agreed with the Oregon court.

In *Sumner* v. *First Baptist Church*, 97 Wn. 2d 1, 639 P.2d 1358 (1982), the Supreme Court of Washington decided that the Free Exercise Clause prohibited a city's building and zoning ordinances from mechanistic application to a church school which was operated as an integral ministry of the church in the same building. Relying on this Court's decisions in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) and *Thomas* v. *Review Board*, 450 U.S. 707 (1981), the Washington court held that although the zoning and building ordinances were neutral on their face, "[t]he *indirect* effect . . . of the government regulation in this instance will profoundly impact the church and its members." *Sumner*, 97 Wn. 2d at 5. The Washington court remanded the case to the trial court because neither the City nor the trial court had made any attempt to seek to accommodate the church's position. The city had simply insisted on rigid application of its codes. The failure to seek accommodation was deemed violative of the First Amendment as interpreted by this Court in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Sheldon* v. *Tucker*, 364 U.S. 479 (1960). The trial court was reversed because it "did not consider whether the means chosen to enforce the governmental interest were necessary and the least restrictive means to achieve the ends sought." *Sumner*, 97 Wn. 2d at 8.

Although the New Hampshire Supreme Court decided the case before it on the grounds of statutory interpretation, it was clear that the constitutional considerations

under the First Amendment had a profound impact on their construction of the city zoning code.[20] *City of Concord* v. *New Testament Baptist Church*, 118 N.H. 56, 382 A.2d 377 (1978). The New Hampshire court ruled that integral church schools located in the church building were "accessory uses" within the meaning of local zoning codes. However, the court noted the problem with the city's position in that case, which is identical to the City of Medford's position, was that "it involves governmental determination of propriety in religious matters and thus could infringe on the free exercise of religion guaranteed by . . . the federal first amendment. *See, e.g., Wooley* v. *Maynard*, 430 U.S. 705, 714-15 (1977). . . ." *City of Concord*, 118 N.H. at 58-59.

The Supreme Court of Alaska, on the other hand, agreed with the Oregon Court of Appeals and rejected a similar claim in *Seward Chapel, Inc.* v. *City of Seward*, 655 P.2d 1293 (Alaska 1982).

Church-related schools are growing in rapid numbers in this country. The vast majority of these churches operate schools in the very same building which houses their Sunday activities. The issue of whether or not the Constitution of the United States permits such churches to operate their educational ministry as a church use, or whether their building must be doubly zoned as a church and then as a school, is an issue which will arise in many more states. The states are now evenly split on this federal constitutional issue. The application of the First Amendment should not vary depending upon the state in which a church operates. Because zoning issues are inherently matters of state law, it is unlikely that other

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[20] This case is not unlike this Court's decision in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) which decided a statutory construction issue, but the constitutional questions which loomed influenced the decision of the Court.

federal courts will have an opportunity to pass upon the First Amendment issues involved in these cases. This Court should take this case to settle the conflict between the state supreme courts.

II. The Oregon Court Of Appeals Has Decided Important Questions Of Federal Constitutional Law Which Have Not But Should Be Decided By This Court.

Madison Would Decry This Attempt To License And Regulate The Integral Ministry Of This Church

The question of obtaining permission from the government to operate a school ministry has never been directly before this Court. However, this Court is not without historical guidance from one of the primary Founding Fathers, James Madison. The fact that Madison has clearly enunciated views on the subject lend considerable credence to the view that this case is of substantial constitutional importance. In a number of this Court's recent decisions, considerable inquiry has been made into the view of the Founding Fathers. Cases which readily provide such historical evidence to guide current constitutional analysis are of great value to the strife-ridden area of church-state relations. This case offers just such an opportunity which will enlarge the nation's understanding of the historical meaning of the First Amendment and its application to current constitutional controversies.

The views of James Madison on the subject of religious freedom have been given great weight by this Court[21] because of his influential role in the development of the First Amendment. While Madison was President, he had

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[21] See, e.g., *Lynch* v. *Donnelly*, ___ U.S. ___, 79 L.Ed. 2d 604, 611 (1984); *Marsh* v. *Chambers*, 463 U.S. 783 (1983); *Everson* v. *Board of Education*, 330 U.S. 1, 8 (1947).

the occasion to consider an Act of Congress which raises the same constitutional conflict present in the case at bar.

Congress enacted a bill entitled "An Act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia." Madison vetoed the bill because, in his view, it contravened the principles enunciated in the First Amendment's Establishment Clause.

In Madison's veto message to the Congress, he explained his view that the bill was unconstitutional:

> Because the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates in particular the article of the Constitution of the United States which declares that "Congress shall make no law respecting a religious establishment." The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and polity of the church incorporated. . . .

S. Padover, *The Complete Madison*, Harper & Brothers (1953), p. 307.[22]

Madison further found constitutional objection to the fact that:

> . . . the bill vests in the said incorporated church an authority to provide for the support of the poor and the education of poor children of the same, an authority which, being altogether superfluous if the provision is to be the result of pious charity, would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty.

Id.

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[22] The complete text of Madison's veto message is reproduced in the Appendix at 66a.

This short paragraph has a tremendous wealth of teaching on the proper relationship of the government with church institutions which provide education for children. Three lessons can be gleaned from Madison's language.

First, *religious institutions are entitled to educate children if they choose to do so in accordance with their religious beliefs and convictions*. This lesson is implicit in the statement that authorization from the government is "altogether superfluous if the provision is to be the result of pious charity." By this statement, Madison correctly predicted this Court's decision in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). It is probably more accurate to say that this Court correctly followed the Madisonian view although there is no evidence that this particular veto message has ever played a part in any of this Court's deliberations.

Second, *religious institutions which provide education for children are not to receive direct government aid for such education*. Madison makes it clear that one of the reasons he finds this bill particularly troublesome is that it "would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty." This Court's numerous decisions which prohibit direct government aid to religious institutions are obviously in accord with the Madisonian view.

It is the third lesson from Madison that is the most applicable to this case. *Religious institutions which educate children cannot constitutionally receive legal authorization from the government*. The bill merely provided the following:

> Sec. 8. *And be it further enacted*, That it shall and may be lawful for the said vestry to make such provision for the support of the said church, as shall by them be thought proper; and to provide also, in such

> manner as to them shall appear proper, for the education of the poor children of the said church.
>
> 22 Annals of Congress 997 (1811), App. at 61a.

This bill merely gave legal permission to the church to educate the poor children of the church as the church saw fit. Madison singled this section out for particular constitutional objection therein. While it was clear that he believed the church had the right to provide education to its children, granting government permission to the church to perform this aspect of its ministry was constitutionally tantamount to giving government money directly to the church for such a purpose. In other words, if it is unconstitutional for a church to get government money for its educational ministry, it is equally unconstitutional to grant government permission for such a ministry of the church.

In this case, the zoning code has authorized the City to give its permission (through a device called a conditional use permit) to a church to educate its children. The government is constitutionally without power to grant such authority to a church. If the government is without authority to grant permission, how much more unconstitutional is it for government to demand that its permission be secured in order for a church to educate its children.

III. The Oregon Court of Appeals Has Decided This Case In Direct Conflict With Principles Enunciated By This Court.

A. The Oregon Court Of Appeals Has Repeatedly Refused To Apply The Decisions Of This Court Regarding The Free Exercise Clause.

The entire discussion of the Oregon appellate court in this case on the Free Exercise Clause issues is as follows:

> Petitioner's first assignment of error is that the city's application of the conditional use permit

> requirement to the operation of its school violates the freedom of religion provisions of the United States and Oregon Constitutions. We held to the contrary in *Damascus Comm. Church* v. *Clackamas Co.*, 45 Or App 1065, 610 P2d 273, *rev den* 289 Or 588 (1980), appeal dismissed 450 US 902 (1981). We are unpersuaded by petitioner's attempt to distinguish that case from the present one and by its arguments to the effect that our reasoning and holding in *Damascus Comm. Church* are incorrect.

App. at 7a.

The *Damascus Comm. Church* case failed to discuss or even cite a single decision of this Court regarding the Free Exercise Clause (or on any other subject for that matter). In a perfunctory two paragraph discussion the Oregon appellate court merely cited its own decision in *Christian Retreat Center* v. *Comm. for Wash. Co.*, 28 Or. App. 673, 560 P.2d 1100 *rev. den.* (1977), which in turn did nothing more than review a 1958 decision of the Supreme Court of Oregon, *Jehovah's Witnesses* v. *Mullen*, 214 Or. 281, 330 P.2d 5 (1958), *appeal dismissed* 359 U.S. 436 (1959).

The *Jehovah's Witnesses* decision can be succinctly summarized in the Oregon Supreme Court's own words when they held:

> Obviously, while freedom of religion cannot be suppressed, its exercise is subject to reasonable restraint.

214 Or. at 319.

The state of the law on religious freedom has progressed a great deal in this Court since 1958. In the intervening 27 years since an Oregon court has troubled itself to consider what pronouncements this Court has made on the subject, the decisions of this Court have remarkably changed the manner of consideration of religious freedom cases. Gone are the days when all laws

which regulate religious freedom are upheld upon a mere showing of the reasonableness of the regulation. The compelling state interest doctrine has never been considered by the Oregon courts in this inbred line of decisions. Perhaps they have not heard that this court now demands that the state demonstrate that the regulation is serving a compelling state interest and that it is using the least restrictive means available in achieving such interest. *Wisconsin* v. *Yoder*, *supra*, *Thomas* v. *Review Board*, *supra*, *Sherbert* v. *Verner*, *supra*, just to mention a few of the more important decisions of this Court, have radically altered the presumption that any reasonable regulation would pass constitutional muster even when dealing with a fundamental First Amendment freedom.

If this Court does not grant certiorari in this case the Oregon courts may continue citing themselves well into the next century before giving any consideration to the decisions of this Court on this vital *federal* constitutional issue.

B. The Oregon Court Failed To Consider The Decisions Of This Court Which Hold That Church-Related Schools Are Integral Ministries And Cannot Be Separately Regulated.

It is not only the general developments in the decisions of this Court on religious freedom which the Oregon court failed to consider, it failed to consider some specifically applicable rulings by this Court.

This Court has clearly held, as recently as last term,[23] that a church school is an integral part of the religious ministry of the church. For example, in *Lemon* v. *Kurtzman*, 403 U.S. 602, 616 (1971), this Court indicated that

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[23] *Grand Rapids* v. *Ball*, ___ U.S. ___, 87 L.Ed.2d 267 (1985).

the parochial schools in question were "an integral part of the religious mission of the Catholic Church."

This Court, in *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975), quoted with approval a section of Justice William Brennan's concurring opinion in *Lemon:*

> The secular education those schools provide goes hand in hand with the religious mission that is the only reason for the school's existence. Within the institution, the two are inextricably intertwined.

421 U.S. at 366.

And, last term, this Court affirmed the conclusion that a church school is an integral ministry of a church in *Grand Rapids* v. *Ball*, ___ U.S. ___, 87 L.Ed.2d 267 (1985). The Court quoted many passages from the cases just cited and concluded that religious schools were too intertwined with the religious mission of the sponsoring church to permit any government financial assistance. The attempts by the churches to separate their secular from religious missions were firmly rejected by this Court holding that for constitutional purposes the church and the school were inseparable and religious.

On the Free Exercise side of the religion clauses, this Court has also held, at least impliedly, that it is unconstitutional for the government to attempt to separate the church school from the church.

In *NLRB* v. *The Catholic Bishop of Chicago*, 440 U.S. 490, (1979), this Court decided a case dealing with attempted regulation by the National Labor Relations Board of the Catholic educational ministries in the Chicago area. The NLRB contended that the subjects taught were "secular," and therefore, subject to the Board's regulation. More precisely, the NLRB contended that only worship was "completely religious," and thus beyond regulation. The government argued that teachers work-

ing at the parochial schools, on the other hand, did come under NLRB jurisdiction because education is only "religiously associated," and not completely religious as worship in a church is.

In a similar way, the City in this case is asserting that the church school is not an integral part of the church ministry, and can be regulated separately.

This Court flatly rejected this line of reasoning advanced by the NLRB in that case and by the City here. This Court, in affirming the decision of the Seventh Circuit in *NLRB* v. *The Catholic Bishop of Chicago*, quoted with implied approval the language of the circuit court, warning of constitutional violations if the National Labor Relations Act was not construed to consider churches and schools as integral ministries:

> At some point, factual inquiry by courts, or agencies into such matters [separating secular from religious training] would almost necessarily raise First Amendment problems. If history demonstrates, as it does, that Roman Catholics founded an alternative school system for essentially religious reasons and continued to maintain them as an "integral part of the religious mission of the Catholic Church," *Lemon* v. *Kurtzman*, 403 U.S. 602, 616 (1971), courts and agencies would be hard pressed to take official or judicial notice that these purposes were undermined or eviscerated by the determination to offer such secular subjects as mathematics, physics, chemistry, and English literature.

440 U.S. at 496.

It should be noted that this Court in *NLRB* v. *The Catholic Bishop of Chicago* did not directly address the First Amendment issues, but construed the statute in a way to avoid the constitutional confrontation. This Court interpreted the National Labor Relations Act in a way

that maintained the integral nature of churches and their related schools.

This Court affirmed this principle in *St. Martin Evangelical Lutheran Church* v. *The State of South Dakota*, 451 U.S. 772 (1981). The state of South Dakota argued that a church school was requested to pay Federal Unemployment Tax for their school employees, because the church school was a separate entity from the church.

This Court rejected this reasoning and ruled that the church school was exempt from the unemployment tax, because it was part of the church. This Court pointed out that the school was part of the church, and not incorporated separately, as is the situation in the case at hand. Also, this Court said in *St. Martin* that "all courses are taught from a religious point of view based on the [church's] religious convictions." 68 L.Ed.2d at 618.

This Court interpreted the Act of Congress to mean that a school is an integral part of the church ministry. Therefore, the school had to be treated the same as the church and was exempt from unemployment taxation. Even though the state argued that church schools came under a separate specific provision of the statute, this Court found that such a provision was not meant to apply because of "[t]he distinction between church schools integrated into a church's structure, and those separately incorporated. . . ." 451 U.S. at 620.

If the private school in the case at hand is an integral part of the church ministry, then the state cannot argue that the school needs a separate zoning permit. This type of reasoning has been rejected in *Lemon*, *Pittinger*, *Grand Rapids*, *NLRB* v. *The Catholic Bishop of Chicago* and *St. Martin*.

The Oregon Court of Appeals ignored these declarations made by this Court, and essentially nullified applica-

tion of the First Amendment to zoning law. The Establishment Clause and the Free Exercise Clause together say that church and state exist in separate realms, and that they can interact only in the most necessary ways, and only with great care. This Court needs to clarify this major point of constitutional law: if it is unconstitutional for the state to fund a church school, because it is an integral part of the church ministry, then how can the state require a separate zoning permit for a church school, because it is not an integral part of the church ministry?

C. The Oregon Court Failed To Consider The First Amendment Decisions Of This Court Regarding Zoning.

The Oregon court's reliance on its own long line of holdings which permit "reasonable" regulation of churches for zoning purposes, not only ignores the Free Exercise cases of this Court, it also shows disdain for this Court's pronouncements in the general area of the First Amendment and zoning.

The Oregon court asserted that the power of local government to control land use was paramount. This flies in the face of this Court's statement in *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981):

> But zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits." *Moore* v. *East Cleveland*, 431 U.S. 494, 514 (1977) Stevens, J., concurring in judgment). Accordingly, it is subject to judicial review; and as is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed. *Thomas* v. *Collins*, 323 U.S. 516, 529-530 (1945).

In *Schad*, the Court further held that "when a zoning law infringes upon a protected liberty, it must be narrow-

ly drawn and must further a sufficiently substantial government interest." 452 U.S. at 68. Additionally, "the Court must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment. . . ." 452 U.S. at 70.

The failure of the Oregon court to even attempt to apply the compelling state interest doctrine makes analysis of the issue somewhat problematic. However, it is clear in this case that not only is the city's interest not compelling, the city's position borders on the ridiculous.

The city's interest is the regulation of land use. Here the church is lawfully permitted to use its land for over 700 persons on Sunday. Eight times as many children are legally present in the preschool, day care, and kindergarten as attend the school ministry. Hundreds of women may attend midweek Bible studies. Dozens of teens may attend the mid-week youth activities. In fact, the church can legally teach children of the same age and for the same length of time (during summer vacation for example) in a vacation Bible school.

The threshold for the city's regulation has absolutely nothing to do with land use, rather it is the content of what is taught. The church may legally convene hundreds of children to teach them about Moses, David, and St. Paul. But if the church teaches only 16 children about George Washington, Abraham Lincoln, or Isaac Newton, they must get an additional zoning permit from the city.

In *Police Department* v. *Mosley*, 408 U.S. 92, 95 (1972), this Court held:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . .

In this case the city of Medford has made a naked attempt to control content of the teaching of the church under the most flimsy of pretenses of land use regulation.

D. The Oregon Court Failed To Properly Analyze The Equal Protection Issues Raised By The Church.

The Oregon Court of Appeals improperly applied the "rational relationship test" instead of the "strict scrutiny test" to its analysis of petitioner's claim under the Equal Protection Clause. The Oregon Court of Appeals held that the:

> "disparate applications of the ordinance" need not pass the "strict scrutiny" test for classifications that impinge on fundamental interests because the fundamental interest that petitioner identifies is its right to the free exercise of religion, which we have held in response to petitioner's first assignment of error, *is not affected* by the application of the conditional use permit requirement to the school. The rational basis test is the proper one by which to measure any classification that was made here, and the classification passes that test.

Appendix at 14a.

This analysis utilizes these standards in a way that is contrary to the decisions of this Court. In effect, the Oregon courts have said that in order to be entitled to a strict scrutiny analysis of an equal protection claim under the Fourteenth Amendment, petitioner must first show that there has been a First Amendment violation. This renders the Equal Protection Clause into a redundancy. All that this Court has required is that a fundamental freedom is impacted or is at stake. *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973).

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike," *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

The Oregon court had no difficulty in justifying the disparate treatment present in the record in that the city specifically exempted the Open Bible Standard Church from the application of its new interpretation of the zoning ordinance. This lack of difficulty stems from the fact that the court applied the rational relationship test rather than the appropriate strict scrutiny standard.

By its definition of "church" in resolution No. 3950, which permitted integral schools to legally operate in church buildings, the city established a classification which included both petitioner and the Open Bible Standard Church. Although the city subsequently revoked this resolution without hearing and without notice to any affected party, the factual similarities between Open Bible Standard and Medford Assembly of God never changed.

The evidence shows that both churches were operating schools meeting state compulsory attendance standards as a part of the church ministry and on the church premises. Both were evangelical churches. Both followed the Bible-based belief that the church is responsible for educating its children. Respondent has also acknowledged the similarity of the two churches and the proceedings related to them.

When respondent exempted Open Bible Standard Church from application of its new interpretation of the zoning law and refused to exempt petitioner, it arbitrarily divided a classification previously established and invidiously discriminated against petitioner. The respondent's distinction between petitioner and the Open Bible Standard Church impinges on petitioner's fundamental freedom of religion.

Under the principles established by this court, classifications which impinge or interfere with fun-

damental constitutional rights must be strictly scrutinized.[24] Strict scrutiny means that the government's action is not entitled to a presumption of validity, but rather that the state must carry a heavy burden of justification to show that the government action was premised upon a compelling state interest and is the least drastic means for effecting these compelling objectives.[25]

This court further defined the strict scrutiny test as it applies to equal protection cases in *Plyer* v. *Doe*.[26] The court stated:

> [t]he Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively individious those classifications that disadvantage a "suspect class" or that impinge upon the exercise of a "fundamental right". With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the state to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.

Although the Court of Appeals completely failed to utilize the "strict scrutiny" analysis, they held that the city had a "rational basis" for their decision because of the city's "continuing interest in encouraging proponents and opponents of zoning actions to use the declaratory interpretation procedure." App. 13a. The appellate court contended that this constituted a rational basis for the disparate treatment. The court appears to be arguing that the rational basis the city has for favoring Open Bible

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[24] *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

[25] *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

[26] 457 U.S. 202 (1982).

Standard over Medford Assembly of God is that they were first to the court house. This is hardly a compelling reason to discriminate between two similarly situated churches.

By treating the Equal Protection tests of this Court as a redundancy, the Oregon Court failed to properly adhere to the principles of the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Oregon Court of Appeals.

Respectfully submitted,

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Date: September 27, 1985

APPENDIX

APPENDIX

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

LUBA No. 82-010
CA A33699

MEDFORD ASSEMBLY OF GOD, an Oregon nonprofit corporation, *Petitioner,*

v.

CITY OF MEDFORD, *Respondent.*

ORDER RECALLING APPELLATE JUDGMENT

On July 24, 1985, petitioner moved for a stay of issuance of the appellate judgment, or recall thereof if the appellate judgment had already issued, pending disposition of a petition for writ of certiorari to the United States Supreme Court. Subsequently, on July 26, 1985, the Court inadvertently issued the appellate judgment.

Petitioner's motion is allowed. The appellate judgment of July 26, 1985, is recalled, and issuance of the appellate judgment is stayed pending disposition of petitioner's petition for writ of certiorari to the United States Supreme Court.

/s/ GEORGE M. JOSEPH
Chief Judge
August 21, 1985

cc: Karen C. Allan
Eugene F. Hart, Jr.

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS DIVISION, SUPREME COURT BUILDING, SALEM, OR 97310

order.23 p.7.
sv

IN THE SUPREME COURT
OF THE STATE OF OREGON

CA A33699
SC S31652

MEDFORD ASSEMBLY OF GOD, an
Oregon nonprofit corporation,
Petitioner on Review,

v.

CITY OF MEDFORD,
Respondent on Review.

ORDER DENYING RECONSIDERATION

The Court has considered the petition for reconsideration and ORDERS that it be denied.

DATE: July 2, 1985.

/s/ Edwin J. Peterson
EDWIN J. PETERSON
Chief Justice

cc: Karen Allan
Eugene Hart

IN THE SUPREME COURT
OF THE STATE OF OREGON

CA A33699
SC S31652

MEDFORD ASSEMBLY OF GOD,

Petitioner,

v.

CITY OF MEDFORD,

Respondent.

ORDER DENYING REVIEW

The Court has considered the petition for review and ORDERS that it be denied.

DATE: May 21, 1985.

/s/ Edwin J. Peterson
EDWIN J. PETERSON
Chief Justice

COPIES TO:

ALLAN, KAREN C	Attorney for: Petitioner
HART, EUGENE F JR	Attorney for: Respondent

NOTE: Linde, J., not participating.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

CA A33699
SC S31652

MEDFORD ASSEMBLY OF GOD,

Petitioner,

v.

CITY OF MEDFORD,

Respondent.

ORDER DENYING RECONSIDERATION

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has, on April 19, 1985, denied the petition. ORAP 10.10. The Supreme Court may now proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 11.03.

/s/GEORGE M. JOSEPH
Chief Judge

August 21, 1985

COPIES TO:

ALLAN, KAREN C	Attorney for: Petitioner
HART, EUGENE F JR	Attorney for: Respondent

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

(82-010; CA A33699)

MEDFORD ASSEMBLY OF GOD,
an Oregon nonprofit corporation,

Petitioner,

vs.

CITY OF MEDFORD,

Respondent.

FILED
COURT OF APPEALS
FEB 27 1985

Judicial Review from Land Use Board of Appeals.

Argued and submitted December 14. 1984.

Karen C. Allan, Medford, argued the cause for petitioner. With her on the brief was Foster & Purdy, Medford.

Eugene F. Hart, Jr., Medford, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P.J. Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Case Name: MEDFORD ASSEMBLY OF GOD v. CITY OF MEDFORD

Appellate case number: A33699

Trial court or agency case number: 82-010

Prevailing party or parties: Respondent

[ ] No costs awarded

[X] Costs awarded to the prevailing party or parties, payable by Petitioner

* * * *

IT IS ORDERED that the prevailing party or parties recover from _____ costs and disbursements on appeal, taxed at _____, and the further sum of $_____ as attorney fees on appeal. (ORAP 11.03, 11.05, and 11.10.)

IT IS FURTHER ORDERED that judgment be entered in favor of the Judicial Department and against _____ in the amount of $_____ for filing fees not waived and unpaid at the time of entry of the final written disposition of this case. ORS 21.605.

Date Supreme Court denied review:

DATED: SUPREME COURT - COURT OF APPEALS

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*This section will be completed upon final determination of costs, disbursements and attorney fees by the appellate court. A copy of the order will be sent to the parties as soon as possible after the decision is no longer stayed. ORS 19.190(1)

BUTTLER, P.J.

Petitioner has operated a church at the same location in the city of Medford since 1952. In 1973, the city approved petitioner's request to change the zone of the property to R-4. The church use is permitted in that zone. In 1979, petitioner began operating a three-grade primary elementary school on the church premises. The school is a conditional use in the zone. Petitioner has not attempted to obtain a conditional use permit. After a city enforcement officer notified petitioner that a conditional use permit was required for the school, petitioner sought declaratory interpretation of the Medford zoning ordinance from the planning commission pursuant to section 10-275 of the ordinance. The planning commission determined that, under the ordinance, a conditional use permit was required to operate the school, and the city council affirmed that determination. Petitioner appealed the council's action to the Land Use Board of Appeals (LUBA), which affirmed the council. Petitioner appeals, and we affirm.[1]

Petitioner's first assignment of error is that the city's application of the conditional use permit requirement to the operation of its school violates the freedom of religion provisions of the

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[1] Initially, LUBA dismissed the appeal on the ground that the city's declaration was advisory and, unlike the denial of an application for a conditional use permit, had no legal "force except that it provides guidance to the city" and the applicant "in how to proceed." LUBA therefore concluded that the city's action was not an appealable "land use decision" within the meaning of ORS 197.015(10). This court reversed LUBA's dismissal of the appeal, *Medford Assembly of God* v. *City of Medford*, 64 Or App 815, 669 P2d 1161 (1983), *aff'd* 297 Or 138, 681 P2d 790 (1984). The Supreme Court explained in its opinion:

> "The [council's] resolution is a 'land use decision' under ORS 197.015(10), which defined 'land use decision' to mean, among other things, a 'determination made by a local government' concerning the 'application' of a zoning ordinance. This formal determination is a basis for LUBA review even though it is only declaratory. * * *" 297 Or at 140.

The present appeal is from LUBA's order on our remand.

United States and Oregon Constitutions. We held to the contrary in *Damascus Comm. Church* v. *Clackamas Co.*, 45 Or App 1065, 610 P2d 273, *rev den* 289 Or 588 (1980), *appeal dismissed* 450 US 902 (1981). We are unpersuaded by the petitioner's attempt to distinguish that case from the present one and by its arguments to the effect that our reasoning and holding in *Damascus Comm. Church* are incorrect.

In its second assignment, petitioner contends that the educational activity conducted on the church premises is part of the church's religious mission; therefore, the school is an "accessory use" to the permitted church use under the zoning ordinance. Accordingly, petitioner argues, the city's construction of the ordinance[2] erroneously treated the school as a conditional use rather than as an accessory permitted use. We agree with LUBA that the city's interpretation is a reasonable

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[2] Section 10-165 of the ordinance provides, so far as relevant:

"10-165 *High Density Multiple-Family District, or R-4 District.*

"(1) Purpose. This district is intended to provide for high density multiple-family residential developments in locations close to shopping and services, transportation or public open space, and, in appropriate locations, a transitional use area between residential districts and other less restrictive districts.

"(2) Permitted uses. The following uses are permitted:

"* * * * *

"(e) Churches subject to the requirements of Section 10-245.(5).

" * * * * *

"(3) Accessory uses. The following accessory uses are permitted:

"* * * * *

"(f) Other accessory uses and accessory buildings and structures customarily appurtenant to a permitted use, but fences shall comply with Section 10-245(19).

"(A) Conditional uses. The following conditional uses may be permitted subject to a conditional use permit:

"(a) Public, parochial, and private schools, including child care facilities, but not including business, technical, or similar schools."

one, *Fisher* v. *City of Gresham*, 69 Or App 411, 685 P2d 486 (1984), and does not present a constitutional defect. *See Damascus Comm. Church* v. *Clackamas Co.*, *supra*.

Petitioner's third and fourth assignments turn on Resolution No. 3950, adopted by the city council in January, 1980, which interpreted the relevant zoning ordinance provisions as allowing another organization, the Open Bible Standard Church, to operate a school without obtaining a separate permit from the one it had acquired for its church operations. The resolution provides, as material:

> "1. That the term 'church' as used in the Medford zoning ordinance includes a school meeting state compulsory attendance requirements operated as a part of the church ministry on the church premises; and,
>
> "2. That such a school being operated by the Open Bible Standard Church is permitted under its original conditional use permit for a 'church.'"

After our decision in *Damascus Comm. Church* v. *Clackamas Co.*, *supra*, the council reconsidered that resolution and adopted a second, which provides in pertinent part:

> "[T]he zoning ordinance of the city of Medford shall be interpreted in accordance with the opinion in *Damascus Community Church* v. *Clackamas County*, and the interpretation announced in Resolution No. 3950 shall not be followed in the future; provided, however, that the Open Bible Standard Church located at 2715 Table Rock Road shall continue to enjoy the privilege of operating its school, in its presently existing facilities only, as provided in Resolution No. 3950."

In its third assignment, petitioner contends that it enjoys a nonconforming use for the operation of the school by virtue of Resolution No. 3950. It relies on section 10.260 of the zoning ordinance, which provides:

> "A use lawfully occupying a structure or site on the effective date of this code or of amendments thereto, which does not conform to the use regulations for the district in

> which it is located, shall be deemed to be a non-conforming use and may be continued * * *."[3]

The essence of petitioner's argument is that, although its school was not in operation before the effective date of the zoning code, it was in operation before Resolution No. 3950 was adopted, thus making the school use lawful. Therefore, that use became a nonconforming use after the subsequent interpretive resolution disavowed the interpretation embodied in Resolution No. 3950. Petitioner regards the interpretive resolutions as having the effect of amendments to the ordinance.[4] LUBA disagreed and explained:

> "We do not accept petitioner's contention [that] the 'lawful use' requirement in the city ordinance has been satisfied in this case. The record discloses that petitioner began to operate its school without city authorization when the zoning ordinance required a conditional use permit for any 'parochial school' in the R-4 district. The ordinance was never amended to eliminate that requirement; therefore, petitioner's school never became a lawful use.
>
> "Petitioner places emphasis on Resolution 3950, adopted by the city in 1980. The resolution interpreted the zoning ordinance permissively in connection with another religious institution. However, it did not *amend* the ordinance to make petitioner's school a lawful use under Section 10.260. We do not construe the resolution to

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[3] Petitioner also relies on the "state common law" pertaining to nonconforming uses, as expressed in *Polk County* v. *Martin*, 292 Or 69, 636 P2d 952 (1981), and earlier cases. For purposes of this case, we find no analytical distinction between the ordinance standard and the standards under the case authority.

[4] Petitioner argues, alternatively, that if the adoption of the resolutions was a quasi-judicial rather than a legislative action, the second resolution effectively overrules the first and can be given only prospective effect. *But see U.S. National Bank* v. *Wagoner*, 71 Or App 266, 692 P2d 149 (1984). That argument fails for at least the same reason as the argument discussed in the text: The ordinance rather than the interpretive resolutions defines the permissible uses of and the conditions for petitioner's use of the property.

determine *petitioner's* rights under the Medford ordinance.

> "We conclude that on and after the effective date of the Medford zoning code, a conditional use permit was required for a parochial school in the R-4 district. Petitioner established a parochial school without obtaining a permit and has never obtained one." (Footnote omitted; emphasis in original.)

We agree with LUBA.

Petitioner's final assignment is that, by allowing the Open Bible Standard Church to operate a school without a conditional use permit and not allowing petitioner to do so, the city has violated petitioner's rights to equal privileges and to equal protection of the laws under Article I, section 20, of the Oregon Constitution and the Fourteenth Amendment to the United States Constitution, respectively.[5] The record does not explain clearly why the city allowed the Open Bible Standard Church to benefit from the interpretation in Resolution No. 3950 after the later resolution was adopted. However, the city states in its brief that, after our decision in *Damascus Comm. Church* v. *Clackamas Co., supra:*

> "The Council decided not to follow its erroneous interpretation announced [in Resolution No. 3950], but felt obligated to the Open Bible Standard Church not to alter its decision in that particular case."

In rejecting petitioner's equal privileges and equal protection argument,[6] LUBA relied principally on *City of Eugene* v.

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[5] Twelve churches in Medford besides petitioner's and the Open Bible Standard Church operate on-premise schools. Nine do so pursuant to conditional use permits, and three enjoy the right to operate a school as preexisting nonconforming uses.

[6] Petitioner does not appear to argue that this is a case in which the requirements of Article I, section 20, and those of the federal Equal Protection Clause differ. *See Olsen* v. *State ex rel Johnson*, 276 Or 9, 554 P2d 139 (1976).

Crooks, 55 Or App 351, 637 P2d 1350 (1981), *rev den* 292 Or 722 (1982), where we held, generally, that the selective enforcement of an ordinance violates equal protection rights "only if there is no rational basis to justify the selective enforcement."

The city appears to argue that the rational basis for the different treatment of petitioner and the Open Bible Standard Church is that Resolution No. 3950 bound the city to allow the latter to continue its school operations on church premises. The city relies on the fact that, in *Medford Assembly of God* v. *City of Medford*, *supra*, n 1, the Supreme Court analogized declaratory resolutions under section 10-275 of the ordinance to declaratory rulings under ORS 183.410. The city notes that ORS 183.410 provides that declaratory rulings issued pursuant to it are "binding between the agency and the petitioner on the state of facts alleged * * * ." However, that language of the statute is unrelated to the point of the comparison the Supreme Court made in *City of Medford*. The court analogized section 10-275 to ORS 183.410 solely to point out that both could provide "a basis for review in the Court of Appeals." 297 Or at 140. That opinion does not hold that the city is bound by its declaratory interpretation; unlike ORS 183.410, the ordinance provision contains no specific language to make the city's declarations binding. The question of whether Resolution No. 3950 bound the city was not before the Supreme Court and was not addressed.

Nevertheless, we agree with the city that its adoption of Resolution No. 3950 establishes a rational basis for enforcing the ordinance differently with respect to the Open Bible Standard Church and other entities. The question is not whether Resolution No. 3950 *forecloses* the city from enforcing the conditional use requirement against the Open Bible Standard Church, but whether the resolution provides the city with any rational reason—inapplicable to petitioner—for *electing* to enforce the ordinance in one instance and not the other. We conclude that there are such reasons, as the following example illustrates. Resolution No. 3950 was adopted in response to a

request by the Open Bible Standard Church for a declaratory interpretation after the trial court in *Damascus Comm. Church* v. *Clackamas Co.*, *supra*, had ruled that the county could not require a church to obtain a conditional use permit to operate a school on the church premises. At that time, the city felt obligated to comply with that decison. After our decision reversing the trial court decision in the *Damascus Comm. Church* case, the city realized that it need not interpret its ordinance as it did in Resolution No. 3950 and disavowed that interpretation in the second resolution. In short, the city recognized that the law had changed and that Resolution No. 3950 was legally incorrect.

The city, nevertheless, has a continuing interest in encouraging proponents and opponents of zoning actions to use the ordinance's declaratory interpretation procedure. That interest is served by the city's adherence to Resolution No. 3950 as it applies to the particular church whose invocation of the procedure resulted in the adoption of the resolution; the city has no comparable interest in misapplying its ordinance in accordance with Resolution No. 3950 to another church that did not initiate the declaratory proceeding that culminated in that resolution and which later initiated the declaratory proceeding involved in this appeal after the city had disavowed the interpretation contained in Resolution No. 3950. If any discrimination necessitating constitutional analysis inheres in the city's differing application of the conditional use permit requirement to petitioner and to the Open Bible Standard Church,[7] there is a

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[7] We assume only for purposes of discussion that some constitutionally cognizable classification is involved here. However, it is just as arguable that all that is involved are different resolutions of different controversies under different legal standards that were understood to be controlling at the time of the decisions. Both the adoption of Resolution No. 3950 and of the later resolution repealing it could have been appealed to LUBA. *See* the Supreme Court's opinion in *Medford Assembly of God* v. *City of Medford*, *supra*, n 1. Had either

rational basis for the discrimination.

Petitioner argues that the rational basis test does not apply here and that the disparate applications of the ordinance must instead pass the "strict scrutiny" test for classifications that impinge on fundamental interests. *See Olsen* v. *State ex rel Johnson, supra*, n 6, 276 Or at 17. However, the fundamental interest that petitioner identifies is its right to the free exercise of religion, which we have held, in response to petitioner's first assignment, is not affected by the application of the conditional use permit requirement to the school. The rational basis test is the proper one by which to measure any classification that was made here, and the classification passes that test.

Affirmed.

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resolution been tested in that way, the ordinance presumably would have been applied in the same way to both organizations or a legal, as opposed to rational, basis for differentiating between them would have been enunciated. Viewed in that perspective, the difference in treatment here might be better characterized as two applications of the ordinance—one of which was arguably erroneous and appealable—than as a classification giving rise to equal privileges and equal protection analysis.

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

LUBA No. 82-010

MEDFORD ASSEMBLY OF GOD,
an Oregon nonprofit organization,
Petitioner,

vs.

CITY OF MEDFORD,
Respondent.

**LAND USE
BOARD OF APPEALS
Oct 4 10:37 AM '84**

**FINAL OPINION
AND ORDER**

On Remand from the Court of Appeals.

Karen C. Allen, Medford, filed the petition for review and supplemental brief, and argued the cause of behalf of Petitioner.

Eugene F. Hart, Jr., Medford, filed the response brief and supplemental memoranda, and argued the cause of behalf of Respondent City.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee; participated in the decision.

AFFIRMED 10/04/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Kressel.

NATURE OF THE DECISION

Petitioner appeals the city's adoption of a resolution interpreting the Medford City Code. The interpretation classifies petitioner's parochial school, which petitioner operates in and adjacent to its church building, as a conditional use requiring issuance of a permit.

FACTS

This appeal is before the Board for the second time. We first ruled the city's resolution did not constitute a reviewable "land use decision" under ORS 197.015(10). *Medford Assembly of God v. City of Medford*, 6 Or LUBA 68 (1982). That ruling was ultimately reversed by the state Supreme Court. *Medford Assembly of God v. City of Medford*, 297 Or 138, ____ P2d ____ (1984).

Our initial opinion set forth the relevant facts. We reiterate some of the facts in the course of discussing the assignments of error raised by the petition.

FIRST ASSIGNMENT OF ERROR

The ordinance in question classifies petitioner's church as a permitted use in the R-4 zoning district. Section 10.165(2)(e), Medford Zoning Ordinance. A separate provision classifies public, private and parochial schools as conditional uses. *Id* at Section 10.165(4). The city takes the position that operation of a parochial school is precluded on or adjacent to church premises unless a conditional use permit is obtained.

Petitioner claims the city's position violates the rights of its members[1] to freely exercise their religious beliefs under the

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[1] In this assignment of error, petitioner appears to be asserting the constitutional rights of its members, not its own rights. Respondent makes no objection on standing or other grounds. We therefore do not consider whether the approach is permissible under ORS Chapter 197. *See Benton County v. Friends of Benton County*, 294 Or 79, 81-82, 653 P2d 1249 (1982).

state and federal constitutions. The constitutional challenge can be summarized as follows:

1. One of the tenets of the Assembly of God church is that education is inseparable from worship. Petitioner's weekday school is considered a ministry of the church. The city's insistence on a separate permit for the school thus constitutes a burden on religious activities conducted by the church.

2. Given the burden on religious activity, the city is obligated to demonstrate that ordinance enforcement serves a compelling governmental interest. The city asserts an interest in land use regulation but has not factually demonstrated that differences between churches and day schools justify different zoning treatment.

3. Even if the city has demonstrated a compelling governmental interest, it has failed to show there are no alternative means by which that interest can be pursued with less restrictive impacts on religious activity. That is, the city has "declined to seek an accommodation which preserves at least a portion of its interests and minimally intrudes on petitioner's free exercise rights." Petitioner's Supplemental Brief at 8.

We begin our analysis by taking note that the free exercise guarantee in the state constitution is to be interpreted in accord with cases construing its federal counterpart. *Jehovah's Witnesses v. Mullen*, 214 Or 281, 330 P2d 5 (1958), *app dis*, 359 US 436 (1959). Those cases have long recognized that the First Amendment does not guarantee the right to express one's view at all times and places or in any manner that may be desired. To the contrary, restrictions on the time, place and manner of the exercise of protected rights may be imposed by government if they (1) are justified without reference to the content of the protected expression, (2) serve a significant governmental interest and, (3) leave open ample alternative channels for communication. *Heffron v. International Society for Krishna Consciousness*, 452 US 640, 648 (1980); *Grayned v. City of Rockford*, 408 US 104 (1972). We believe the challenged ordinance meets this three part test.[2]

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[2] Petitioner relies heavily on the tests set forth in *Sherbert v.*

Petitioner's attack bears close resemblance to the issues raised and resolved in *Damascus Community Church v. Clackamas County*, 45 Or App 1065, 610 P2d 273 (1980), *rev den* 289 Or 587 (1980), *app dis* 450 US 902 (1981). In 1967, plaintiff obtained a conditional use permit for a church in an RA-1 (Rural Agricultural) zone in Clackamas County. In 1975, county zoning officials became aware plaintiff was operating a full-time parochial school on church premises. The county then notified plaintiff that a separate conditional use permit was required for operation of the school in the RA-1 zone. Eventually the county brought suit to enjoin operation of the school as a violation of the zoning ordinance.

As in this case, plaintiff claimed that by requiring a separate permit for the parochial school, the county ordinance deprived plaintiff of its constitutionally right to the free exercise of religion. This claim was rejected on grounds that the ordinance did not infringe on religious *beliefs* but instead imposed reasonable limits on religious *practices*. The court stated:

> "The county ordinance is clearly intended as land use regulation, and it permits both churches and parochial schools, but not necessarily on the same site if the requirements are not met. There is no contention that the county,

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Verner, 374 US 398 (1963) and *Wisconsin v. Yoder*, 406 US 205 (1972), but we believe those cases do not provide guidance here. The cited cases involve the validity of laws which required plaintiffs to set aside their religious beliefs in order to obtain governmental benefits or to avoid governmental sanctions. *Sherbert* struck down a state's denial of unemployment compensation benefits to a Seventh Day Adventist who refused to work on Saturdays. *Yoder* struck down a state compulsory attendence law which required members of the Old Order Amish religion to send their children to public schools beyond the eighth grade, in violation of their religious beliefs.

By contrast, the present case involves a permit regulation governing the siting of a religious facility. We believe it is appropriate to analyze this sort of regulatory measure as a time, place and manner restriction on the exercise of First Amendment rights. *Heffron v. International Society of Krishna Consciousness, supra.*

> as a matter of practice, has not permitted parochial schools or has discriminated in favor of, or against, any schools sponsored by any particular sect. A full-time school is a more intensive use than a church, and there is no constitutional prohibition against the county's adopting different requirements for the two uses." 45 Or App at 1073.

Damascus Community Church, supra, recognizes that content-neutral restrictions on the place and manner of the exercise First Amendment freedoms may be imposed by local zoning authorities. The case specifically recognizes that separate zoning treatment of churches and parochial schools represents such a restriction. An even broader recognition that enforcement of reasonable land use regulations does not unduly interfere with religious liberties appears in *1000 Friends of Oregon v. Wasco County Court*, 62 Or App 75, 659 P2d 1001 (1983). In that case a religious organization proposed to incorporate a city (deemed part of the ministry of the religious organization) in a rural agricultural area. The proposal was challenged on grounds it conflicted with statewide land planning law. In response to the challenge, the organization and certain of its members claimed the challenge was constitutionally impermissible because of its potential effect on civil liberties. The court addressed this contention as follows:

> "Respondents assert that petitioners' appeal is equivalent to requiring respondents to obtain a license before engaging in their activities. To an extent, of course, the land use laws do require some prior approval, but that requirement does not interfere unconstitutionally with respondents' liberties. The land use laws are permissible impositions of reasonable limitations designed to protect the public welfare. *See Christian Retreat Center v. Commission for Washington County*, 28 Or App 673, 680-681, 560 P2d 1100, *rev den* (1977), and serve a significant governmental interest. *See 1000 Friends of Oregon v. LCDC*, 292 Or 735, 744-750, 642 P2d 1158 (1982). If they restrict First Amendment freedoms, they do so by time, place and manner restrictions that are not based on the content or subject matter of speech, at least so far as anything in the present record discloses." 62 Or App at 83.[3]

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[3] This discussion of the relationship between the state's land use

We read the foregoing authorites to warrant rejection of petitioner's First Amendment challenge. The challenged zoning regulation is "content-neutral"—it applies uniformly to all sponsors of parochial schools in the city. The ordinance serves a significant governmental interest by assuring, through the conditional use permit process, that operation of a school in a residential area will not adversely affect that area.[4] Finally, the regulatory ordinance leaves ample room for the exercise of protected rights. There is no allegation or proof in this appeal that Medford has applied the permit requirement to prohibit or severely restrict locations for parochial schools.

The challenged measure qualifies as a reasonable restriction on the time, place and manner of the exercise of petitioner's

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laws and religious liberty arose in the unusual context of a standing challenge. Certain respondents claimed that to grant standing to those who would challenge the incorporation would unduly interfere with respondents' exercise of religious liberty. The court noted respondents had confused standing with a challenge on the merits, 62 Or App 82, but then discussed the constitutional issue in terms which could apply in *either* context. For this reason we consider the opinion in *Wasco County* persuasive on the substantive constitutional law issue presented here.

[4] Petitioner argues its school is small and will have fewer negative impacts on the neighborhood than are already associated with the church itself. We are invited to take this fact into account in striking a balance between the city's regulatory interests and petitioner's interests. However, we believe it would be incorrect to evaluate the validity of the ordinance in terms of the threat to the city's objectives presented by this *specific facility.* As the U.S. Supreme Court stated in *Heffron v. International Society for Krishna Consciousness:*

> "As we see it, the Minnesota Supreme Court took too narrow a view of the state's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds. The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON. That organization and its ritual of sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds." 452 US at 652.

rights. *Heffron v. International Society for Krishna Consciousness, supra.* We conclude petitioner's first assignment of error must be denied.[5]

SECOND ASSIGNMENT OF ERROR

Petitioner next contends the parochial school is an accessory use[6] to the church and is therefore allowable under the Medford Zoning Ordinance without issuance of a conditional use permit. The city responds by pointing out that its ordinance specifically lists parochial schools as conditional uses in the R-4 district. We are urged therefore to reject petitioner's "accessory use" argument.

The reasonable interpretation of a local enactment by local officials is to be given weight by reviewing tribunals, including this Board. *Fisher v. City of Gresham*, 69 Or App 441, ___ P2d ___ (1984). The city's ordinance interpretation in this case is reasonable. The specific classification of parochial schools as conditional uses clearly reflects an intent to exclude such schools from the more general category of "accessory uses."[7]

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[5] In reaching this result we accept petitioner's claim the weekday parochial school is an integral activity of the church. However, we note petitioner does not claim its religious beliefs require that this activity take place *on church premises*. This supports our decision to characterize the city's ordinance as a control over the location of a religious *activity*, rather than over the exercise of a religious *belief*. *See Damascus Community Church v. Clackamas County*, 45 Or App 1065, 1073, 610 P2d 273 (1980).

[6] Section 10.115 of the Medford Ordinance provides:

> "Accessory structure or use shall mean a structure or use incidental and subordinate to the main structure or use on the same lot."

Section 10.165 of the ordinance provides a list of accessory uses in the R-4 district. The section includes the following:

> "f. Other accessory uses and accessory buildings and structures customarily appurtenant to a permitted use, but fences shall comply with Section 10.245(19)."

[7] Fundamentally, petitioner's "accessory use" claim is closely tied

As the Court of Appeals stated in *Damascus Community Church v. Clackamas County, supra:*

> "It may be that *certain types* of anciliary uses 'usually connected with a church' *are implicitly* encompassed by conditional use permits for churches issued under the county ordinance, notwithstanding the absence of language in the ordinance so providing. However, we need not decide that question here, because it is clear that full-time parochial schools are *not* among the uses which could be regarded as implicit in a conditional use permit for a church under this ordinance. The section of the ordinance governing conditional uses treats churches under one subsection and parochial and private schools under other subsections. The minimum conditions for the church and for the school use differ. Thus, the ordinance clearly manifests the county's legislative decision to make the granting of and criteria for conditional use permits for churches and for parochial schools different and independent. We accordingly conclude that, under the ordinance, a conditional use permit for a church does not automatically authorize the operation of a full-time parochial school." 45 Or App at 1071. (Emphasis in original). (Footnote omitted).

We find no significant distinction between the ordinance at issue in *Damascus Community Church v. Clackamas County, supra,* and the ordinance at issue here. Both ordinances separately classify churches and parochial schools. Although the Clackamas County ordinance did not provide specifically for "accessory uses" the appellate court assumed that such uses were implicitly authorized. Nonetheless, the specific classification of parochial schools as separate conditional uses was the controlling aspect of the ordinance.

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to its constitutional argument. That is, petitioner urges us to construe the school as an "accessory use" because to do otherwise would infringe on its constitutionally protected right to exercise its religious beliefs. In view of our disposition of the First Amendment issue, however, we can not accept this argument. The Medford ordinance clearly classifies this school as a conditional use, wholly distinct from the church. We find no constitutional defect in this regulatory approach.

Based on the foregoing, this assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner next contends its parochial school constitutes a lawful non-conforming use which the city may not now subject to conditional use permit requirements. The claim to non-conforming use status is predicated on the following facts:

1. Petitioner has operated as a church at its present location since 1952. In 1973, the lot occupied by the church and the two adjacent lots were rezoned from C-2 (Commercial) to R-4 (Residential).

2. As a result of the rezoning, the church became a permitted (i.e., conforming) use.

3. Between 1977 and 1980 petitioner established a full-time parochial school on the R-4 lots adjacent to the church. The city did not notify petitioner that the school could not be established in the R-4 district without a separate permit, although the district classified parochial schools as conditional uses.

4. In early 1980 the city reviewed the zoning status of another parochial school operating in connection with a church (The Open Bible Standard Church). By Resolution 3950, the city concluded the conditional use permit for the Open Bible Standard Church also authorized operation of the school. The city resolved as follows:

   "1. That the term 'church' as used in the Medford Zoning Ordinance includes a school meeting state compulsory attendence requirements operated as part of the church ministry on the church premises; and

   "2. That such a school being operated by the Open Bible Standard Church is permitted under its original conditional use permit for a 'church.'" Resolution 3950.

As we understand it, petitioner's non-conforming use claim rests on the idea that, although the ordinance is now interpreted to require a conditional use permit for a parochial school in the R-4 district, petitioner's school was in operation when

the city interpreted the ordinance more permissively. Accordingly, the facility is claimed to be a "lawfully established" nonconforming use under § 10.260 of the Medford ordinance:

> "*Non-Conforming Uses.* A use lawfully occupying a structure or site on the effective date of this code or of amendments thereto, which does not conform to the use regulations for the district in which it is located, shall be deemed to be a non-conforming use and may be continued, ..."

The city's resolution rejects the non-conforming claim on grounds petitioner's school was never established as a "lawful use." That determination is within our review jurisdiction. *Foreman v. Clatsop County*, 297 Or 129, ___ P2d ___ (1984).

We do not accept petitioner's contention the "lawful use" requirement in the city ordinance has been satisfied in this case. The record discloses that petitioner began to operate its school without city authorization when the zoning ordinance required a conditional use permit for any "parochial school" in the R-4 district. The ordinance was never amended to eliminate that requirement; therefore, petitioner's school never became a lawful use.

Petitioner places emphasis on Resolution 3950, adopted by the city in 1980. The resolution interpreted the zoning ordinance permissively in connection with another religious institution. However, it did not *amend* the ordinance to make petitioner's school a lawful use under Section 10.260. We do not construe the resolution to determine *petitioner's* rights under the Medford ordinance.[8]

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[8] Petitioner urges us to construe Resolution 3950 as evidence of the city's belief its ordinance was not intended to distinguish between requirements for churches and parochial schools. We decline to so construe the ordinance in light of the unambiguous distinction in the text itself. *City of Hillsboro v. Housing Development Corp.*, 61 Or App 484, 657 P2d 726 (1983).

We view Resolution 3950 only as a declaration of the rights of the Open Bible Standard Church under the Medford Zoning Ordinance.

We conclude that on and after the effective date of the Medford zoning code, a conditional use permit was required for a parochial school in the R-4 district. Petitioner established a parochial school without obtaining a permit and had never obtained one. The code was never amended to relieve petitioner of this requirement. Therefore, the school can not qualify under the city's definition of "non-conforming use." *See also, Polk County v. Martin*, 292 Or 69, 76, 636, P2d 952 (1981).

Petitioner's third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The final contention is that the city's failure to exempt petitioner's parochial school from the conditional use permit requirement in the R-4 district denies petitioner the equal protection of the law, in violation of the state and federal constitutions.[9] This claim is predicated on the city's express decision not to enforce its permit requirement against a parochial school (the Open Bible Standard Church) allegedly indistinguishable from petitioner's facility.[10]

See Medford Assembly of God v. City of Medford, 297 Or 138, 140-41, ____ P2d ____ (1984) (city procedure for ordinance interpretation is analogous to declaratory order under ORS 183.410; such orders are "*binding between the agency and the petitioner* on the state of facts alleged, unless it is altered or set aside by a court.") (emphasis added). Petitioner's rights *vis a vis* the non-conforming use claim should not be determined by reference to that resolution, but by the ordinance text itself.

[9] *See* Article I, Section 20, Oregon Constitution; Section 1, Amendment XIV, U.S. Constitution. The parties have treated the state and federal constitutional provisions as co-extensive. For purposes of this appeal we do likewise.

[10] The record indicates that in January, 1980, the city interpreted its ordinance to authorize the Open Bible Standard Church to operate a parochial school under the church's conditional use permit. *See* Medford Resolution 3950. The resolution, which is quoted at page 9 of this opinion, expressed the interpretation in general terms, although

We reject this claim. In essence, the charge is that the city has selectively enforced its ordinance against petitioner. To be constitutionally improper, however, selectivity or enforcement must be deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification. *Dyler v. Boles*, 368 US 448 (1962). The mere fact a city chooses to direct its enforcement efforts against one, and not other violators, does not itself render the action unconstitutional. As the Court of Appeals stated in *City of Eugene v. Crooks*, 55 Or App 351, 634 P2d 1373 (1981):

> "It is clear that defendants have failed to allege that any selective enforcement against them was based upon their membership in a suspect class. Accordingly, defendants can prevail on their equal protection argument only if there are no rational basis to justify the alleged selectivity in enforcement. Defendants allege that plaintiff prosecuted their violation only because a complaint was received. We can easily imagine sensible reasons (e.g., lack of funds) why plaintiff might distinguish between violations of which it is generally aware and violations about which a complaint is received. Such selective enforcement is not irrational." 55 Or App at 355. (Citations omitted).

Petitioner has not demonstrated the city deliberately singled it out for ordinance enforcement because of its religious beliefs. The fact an exemption was granted to another institution does not constitute the necessary proof.[11] Accordingly, the city's

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its subject was a specific use. Six months later, the city adopted another resolution, withdrawing the previous ordinance interpretation. *See* Medford Resolution 4108. However, that resolution expressly provided that the Open Bible Standard Church "shall continue to enjoy the privilege of operating the school, in its presently existing facilities only, as provided. in Resolution No. 3950." Neither resolution referred to petitioner.

[11] Presumably, the exemption of the Open Bible Standard Church from ordinance enforcement was allowed on the theory the institution had relied on the city's prior ordinance interpretation concerning its rights. The city concluded in this case that petitioner had not relied on the prior interpretation, since petitioner's school was commenced *before* the interpretation was issued.

enforcement of the ordinance must be upheld if supported by a rational basis. We believe the city passes this test for the same reasons stated in *City of Eugene v. Crooks, supra.*

Based on the foregoing, the Fourth Assignment of Error is denied.

The city's decision is affirmed.

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 82-010, on October 4, 1984, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addresssed to said parties or their attorney as follows:

Karen C. Allen
Foster & Purdy
P.O. Box 1667
Medford, OR 97501

Eugene F. Hart, Jr.
City Attorney
411 West 8th Street
Medford, OR 97501

Dated this 4th day of October, 1984

/s/ Patti J. Kadaja
PATTI J. KADAJA
Administrative
Assistant

Filed: May 22, 1984

IN THE SUPREME COURT
OF THE STATE OF OREGON

(SC S30142; CA A25498; LUBA No. 82-010)

MEDFORD ASSEMBLY OF GOD,
an Oregon nonprofit corporation,
Respondent on Review,

v.

CITY OF MEDFORD,
Petitioner on Review.

In Banc

On review from the Court of Appeals*

Argued and submitted January 24, 1984

Karen C. Allan, Medford, argued the cause and filed response for respondent on review. With her on the response was Stuart E. Foster and Purdy, Medford.

Eugene F. Hart, Jr., Medford, argued the cause and filed petition for petitioner on review. With him on the brief was William J. Scheiderich, Medford.

LINDE, J.

Decision of the Court of Appeals is affirmed.

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*On appeal from Final Opinion Order of Dismissal of LUBA of July 15, 1982. 64 Or App 815, 669 P2d 1161 (1983).

LINDE, J.

In *Forman* v. *Clatsop County*, decided this day, we affirmed a decision of the Court of Appeals that the Land Use Board of Appeals (LUBA) has exclusive jurisdiction to review the determination of a local government whether a landowner has a right to pursue a use of land not in conformity with the local government's land use regulation. 63 Or App 617, 665 P2d 365 (1983), affirmed ___ Or ___, ___ P2d ___ (1984). Following its *Forman* decision, the Court of Appeals reversed and remanded to LUBA the present proceeding, which LUBA had dismissed for lack of jurisdiction. Consistent with our affirmance in *Forman*, we also affirm this decision.

As stated in LUBA's opinion, petitioner operates a church at a site zoned since 1973 to permit use for a church. Subsequently petitioner added to its program a school teaching the first three elementary grades. This school is a conditional use in the applicable zone. A code enforcement officer notified petitioner that operation of the school required a conditional use permit. Petitioner then pursued a procedure provided in the city's ordinance to obtain an interpretation that no permit was required. The City Planning Commission issued a formal denial of the requested determination. On appeal to the city council, the council, after a hearing, adopted a "resolution" denying the request.

The resolution is a "land use decision" under ORS 197.015(10), which defines "Land use decision" to mean, among other things, a "determination made by a local government" concerning the "application" of a zoning ordinance. This formal determination is a basis for LUBA review even though it is only declaratory. The procedure provided by the city is analogous to the declaratory order provided by the state Administrative Procedure Act in ORS 183.410, which serves as a basis for review in the Court of Appeals.[1] There is no occasion in this

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[1] Medford Zoning Ordinance 10-275:

"In the event of an ambiguity in this code affecting enforcement

case to consider whether a landowner might be able to compel a city to issue such a reviewable order when the city does not provide the kind of procedure that Medford has provided. The Court of Appeals correctly concluded that LUBA erred in holding that it lacked jurisdiction of petitioner's appeal.

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thereof, the planning commission shall have power to declare the meaning and intent, and interpret the provisions, of this code. . . .

"(1) . . . Any action of the planning commission interpreting any uncertainty or ambiguity shall be in the form of a resolution and shall be signed by the president or presiding member of the commission and filed with the city recorder.

"(2) . . . In case an applicant is not satisfied with the action of the commission on his appeal, he may, within five days after the action of the planning commission, appeal in writing to the city council. . . .

"(3) . . . Except as otherwise specifically provided in the zoning ordinance, any order or determination made by the planning commission in the exercise of discretionary authority conferred by the zoning ordinance may be appealed to the city council by any person having a substantial interest in the subject matter of the order or determination, if such appeal is filed in accordance with this section; and, upon the perfection of the appeal, the procedure shall be the same as above set forth."

ORS 183.410:

"On petition of any interested person, any agency may in its discretion issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. However, the agency may, where the ruling is adverse to the petitioner, review the ruling and alter it if requested by the petitioner. Binding rulings provided by this section are subject to review in the Court of Appeals in the manner provided in ORS 183.480 for the review of orders in contested cases. The Attorney General shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. The petitioner shall have the right to submit briefs and present oral argument at any declaratory ruling proceeding held pursuant to this section."

The decision is affirmed.
SUPREME COURT COURT OF APPEALS

NOVEMBER 29, 1983

EUGENE F. HART, JR.
ATTORNEY AT LAW
411 WEST 8TH STREET
MEDFORD, OR 97501

RE: MEDFORD ASSEMBLY OF GOD V. CITY OF MEDFORD

CA No. A25498 SC No. S30142

The Court of Appeals has considered the Petition for Review filed in this case and has on November 25, 1983, decided not to rehear the matter or change its decision. Therefore, the Supreme Court will proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 10.10

Sincerely,

Carol Justis

CAROL JUSTIS
Records Administrator

cc: Karen C. Allan

IN THE SUPREME COURT
OF THE STATE OF OREGON

CA A25498

SC 30142

MEDFORD ASSEMBLY OF GOD,
and Oregon nonprofit corporation,
Respondent on Review,

v.

CITY OF MEDFORD,
Petitioner on Review.

ORDER ALLOWING REVIEW

IT IS HEREBY ORDERED that respondent's petition for review is allowed and will be set down for oral argument as soon as possible. Parties to the cause will receive later notification of the exact date and time of argument.

DATE: December 20, 1983.

/s/ Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

Copies mailed on December 19, 1983, to:

Eugene F. Hart, Jr.
Karen C. Allan

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

(82-010; CA A25498)

MEDFORD ASSEMBLY OF GOD,
an Oregon nonprofit corporation,

Petitioner,

v.

CITY OF MEDFORD,

Respondent.

Judicial Review from Land Use Board of Appeals.

Argued and submitted February 28, 1983.

Karen C. Allen, Medford, argued the cause for petitioner. With her on the brief was Foster & Purdy, Medford.

William J. Scheiderich, Medford, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Reversed and remanded.

Buttler, P.J., specially concurring.

Rossman, J., specially concurring

LMED.1 FILED: October 5, 1983

WARREN, J.

On January 21, 1981, the Medford city council adopted a resolution determining that its zoning ordinance required petitioner to obtain a conditional use permit to operate its elementary school on church premises and that petitioner had no vested right to continue the use. Petitioner appealed that decision to the Land Use Board of Appeals (LUBA). LUBA determined that the decision was not a land use decision under ORS 197.015(10), because it was only advice to the applicant, and dismissed petitioner's appeal for lack of jurisdiction.

The sole issue on appeal to this court is whether LUBA has jurisdiction to decide petitioner's appeal. For the reasons set out in *Forman* v. *Clatsop County*, 63 Or App 617, 665 P2d 365 (1983), we hold that the city council's action determining that petitioner has no vested right was a land use decision under ORS 197.015(10). *See also Ore. Elec. Sign Ass'n. Inc.* v. *Beaverton*, 60 Or App 518, 654 P2d 1149 (1982). LUBA has exclusive jurisdiction over "land use decisions of a local government." Or Laws 1979, ch 772, § 4(1)

Reversed and remanded.

BUTTLER, P.J., specially concurring.

I concur with the disposition of this case only because this court's decision in *Forman* v. *Clatsop County*, 63 Or App 617, 665 P2d 365 (1983), for which a petition for review has been filed, requires a consistent result here. *Forman* was decided *in banc* by a six to four majority; I adhere to the views expressed in the dissents.

Here, petitioner sought review by LUBA of a "resolution" adopted by respondent. In dismissing the proceeding, LUBA stated:

> "We agree that Resolution 4541 is not a land use decision but for somewhat different reasons than those advanced by the respondent. Resolution 4541 does nothing except declare what the city understands to be the meaning of terms in its own ordinance. Resolution 4541 does not deny or in any way effect application for a building permit or any other permit to construct, maintain or operate a school or any other use in the R-4 zone. It is advice to the applicant that if it wishes to continue operation of its school, it must apply for and receive a conditional use permit from the city. If the applicant refuses, the city can seek to enjoin continued use of the school in circuit court. The city, however, would have to prove in circuit court that the use was in violation of the zoning ordinance. The city's own determination the use was in violation of the ordinance would be of no effect. In this sense the determination is much like a city's determination that a person has a vested right. Once challenged, the city's determination means nothing. It has no force except that it provides guidance to the city in how to proceed. * * * The city's determination in this case about the church's use of the property for school purposes only provides guidance to the applicant as to what the city expects from the applicant. The determination may also provide guidance to the city in what action to take should the church not apply for a conditional use permit or cease operation of a school on the property. Determinations such as this which merely provide advice but do not in any of themselves affect the use of land are not land use decisions within the meaning of ORS 197.015(10)." (Footnotes omitted.)

In *Forman*, the petitioners sought declaratory relief in the circuit court following the county commissioners' adoption of a similar resolution. We affirmed the trial court's dismissal on the ground that the review of the county's resolution dealing with the question whether a preexisting nonconforming use gave the petitioners a vested property right is within the exclusive jurisdiction of LUBA.

Although I think LUBA was right here, both for the reasons it gave and for those stated in the *Forman* dissenting opinions, *Forman*, at least for the present, states the law.

LMED.SC

MEDFORD ASSEMBLY OF GOD
v.
CITY OF MEDFORD
Warren, J., majority

ROSSMAN, J., specially concurring.

As pointed out by Judge Buttler, the result in this case is mandated by this court's recent decision in *Forman* v. *Clatsop County*, 63 On App 617, 665 P2d 365 (1983). Therefore, I must concur. However, for the same reasons I dissented in *Forman*, I feel compelled to express my reservations concerning the course this court is taking. I remain true to may conviction that the primary jurisdiction to determine the existence of vested property right should and does remain in the circuit courts of this state. The majority of this court believes that the legislature, in its creation of LUBA, has somehow suddenly divested the circuit court of its time-honored role and conferred this jurisdiction on local governments. The legislation simply does not have that effect. The creation of LUBA establishes a forum for the *review* of certain local government decisions. Nothing is said in that legislation about expanding the authority of local governments. Such authority is untouched and must therefore remain the same as it was when local governments were concededly powerless to determine the existence of a nonconforming use. It follows that, if a local government lacks authority to make a decision, there is no decision for LUBA to review. LUBA recognized this when it correctly characterized the situation in this case as involving a vested right, and accordingly dismissed the proceeding in the belief that circuit courts had primary jurisdiction. While I agree with LUBA's decision for the reasons stated in the *Forman* dissenting opinions, I realize we are currently bound by the majority's holding.

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

LUBA NO. 82-010

MEDFORD ASSEMBLY OF GOD,
an Oregon nonprofit organization,

Petitioner,

vs.

CITY OF MEDFORD,

Respondent.

**LAND USE
BOARD OF APPEALS
JUL 15 8:15 AM '82**

**FINAL OPINION
(ORDER OF DISMISSAL)**

Appeal from City of Medford.

Karen C. Allan, Medford, filed a brief and argued the cause for petitioner. With her on the brief were Foster & Purdy.

William J. Scheiderich, Medford, filed a brief and argued the cause for respondent. With him on the brief was Eugene F. Hart, Jr.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

DISMISSED 7/15/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

BAGG, Referee.

Petitioner appeals Medford City Council Resolution No. 4541, dated January 21, 1982. The resolution upheld the Medford City Planning Commission's interpretation of Section 10-165 of the Medford City Code, requiring the First Assembly of God Church to obtain a conditional use permit for operation of a school within the City of Medford.[1]

FACTS

Petitioner has operated a church at its present site since 1952. Prior to 1973, the church was a non-conforming use in a C-2 (commercial) zoning district. In 1973, the church obtained approval of a zone change from C-2 to R-4 for the main church premises and adjacent property. A church is a permitted use in the R-4 zone.

Petitioner operates a day care center on the church property, a kindergarten, a preschool and grades 1 through 3. Grades 1 and 2 were initiated in 1979, and grade 3 was initiated in 1981. At issue in this case is the operation of the three elementary grades.

The challenged resolution, Resolution 4541, finds the petitioner is operating "an elementary (primary) school meeting

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[1] The zoning ordinance of the City of Medford at Section 10-275 provides

> "In the event of an ambiguity in this code affecting enforcement thereof, the planning commission shall have power to hear and decide appeals from administrative interpretations and to declare the meaning, intent, and interpret the provisions, of this code. In thus resolving ambiguities on appeal, the planning commission shall so interpret the code as to carry out Section 10-105 [the "purpose" section of the ordinance] and the expressed purpose of the zoning district involved."

Section 10-275 allows appeals of the planning commission interpretation to the city council. Appeals under Section 10-275 are conducted in the same manner as appeals of other city land use actions. See Section 10-270.

State of Oregon compulsory attendance requirements on church premise at 1108 West Main Street and in separate structures at 25 and 29 Quince Street, Medford, and has been operating that school since 1979." A "public, parochial" or "private school" is a conditional use within the R-4 district.[2]

The city has considered the issue of church schools before. In January of 1980, the city council adopted Resolution 3950 which includes a determination that the term "church" as used in the ordinance "includes a school meeting state compulsory attendance requirements operated as part of the church ministry on the church premises **** *" At issue in the proceeding giving rise to Resolution 3950 was a school operated by Open Standard Bible Church. The church operated the school under the Church's own conditional use permit. The effect of the Resolution was to require no additional permit for operation of a school.

On July 3, 1980, the city council in an apparent reaction to *Damascus Comm. Church* v. *Clackamas Co.*, 45 Or App 1065, 610 P2d 273 (1980), adopted Resolution 4108 which referred to the city's earlier Resolution 3950 and repealed Resolution 3950, at least in part. The city's Resolution 4108 found that an ordinance similar to Medford's was tested in the Clackamas County case. The city interpreted the *Damacus* case to require that Resolution 3950 be repealed and that churches must obtain separate conditional use permits in order to operate full-time parochial schools on church premises. However, in what appears to be a finding of a vested right for the Open Bible Standard Church, the city exempted the Open Bible Standard Church from this new ordinance interpretation.

"NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MEDFORD,

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[2] At the time petitioner sought and obtained city approval for the zone change to R-4, the city required that the petitioner submit plans and specifications for remodeling the church. Those plans and specifications as submitted made no mention of operation of a school.

OREGON, that the zoning ordinance of the City of Medford shall be interpreted in accordance with the opinion in *Damascus Comm. Church* v. *Clackamas Co.* and the interpretation announced in Resolution No. 3950 shall not be followed in the future; provided, however, that the Open Bible Standard Church located at 2715 Table Rock Road shall continue to enjoy the privilege of operating its school, in its presently existing facilities only, as provided in Resolution 3950."

In October of 1981, the code enforcement officer for the City of Medford notified Petitioner Medford Assembly of God that operation of a school on church premises required a conditional use permit. Petitioner's attorney then requested an interpretation by the staff of the city planning department that a conditional use permit was not, in fact, required. On October 26, 1981, Mr. Eisenhard, Planning Director, notified petitioner that a conditional use was required. His determination was appealed to the planning commission on October 29, 1981. On December 17, the planning commission issued a formal denial of the petitioner's request, and on December 14, petitioner appealed the matter to the city council.

The city council heard the appeal on January 7, 1982, and on January 21, 1982 the city issued Resolution 4541 upholding the decision of the planning commission and denying the appeal. An appeal to this Board followed.

Resolution 4541 recites, among other things, that the church is operating in elementary school meeting State of Oregon compulsory attendance requirements on church property; that the church lies in the R-4 zone; that public, parochial or private schools are conditional uses in the R-4 zone; that the church has not sought a conditional use for the school; that Resolution 3950 stated that the term "church" as used in the zoning ordinance included schools; that Resolution 4108 reconsidered Resolution 3950 and did away with the above interpretation of "church" in Resolution 3950 and that the First Assembly of God did not act in reliance upon Resolution 3950 in continuing to operate and expanding its school on January 17, 1980. After these recitations, the city concludes that the church existed for many years

before the school started. The city recognizes the school is an inseparable part of the ministry of the church, but "the interpretation and application of the zoning ordinance is independent of church doctrine." The city states that the operation of a school is not "an accessory use to the permitted use (the church) but is, instead, a separate conditional use in the R-4 zoning district, requiring a conditional use permit for operation. The city states that operation of the school without a valid conditional use permit is an "illegal use of those properties under the zoning ordinances then and now existing." The city disclaims any notion that Resolution 3950 operated to amend the zoning ordinance, and the city states that the Assembly of God Church did nothing so as to vest a right in the church to continue to operate the school after Resolution 3950 was rescinded by Resolution 4108. The city holds that the code provision listing a school as a conditional use, subject to a conditional use permit, is not a law respecting the establishment of religion or prohibiting the free exercise of religion such as to violate the First and Fourteenth Amendments to the United States Constitution or any other provision of the U.S. Constitution or State of Oregon Constitution. The city finally resolves

> "The appeal of the planning commission's interpretation of Section 10-165, Medford Code, to require First Assembly of God Church to obtain a conditional use permit for operation of its compulsory attendance school at 1108 West Main and 25 and 29 Quince Street, Medford, be and same is hereby denied."

OPINION

ASSIGNMENT OF ERROR NO. 1

"Respondent erred in requiring a conditional use permit for petitioner's school operated on church premises as part of its ministry in violation of Article I, Sections 2 and 3, of the Oregon Constitution and Amendments I and XIV to the United States Constitution.

ASSIGNMENT OF ERROR NO. 2

"Respondent erred in deciding that petitioner's school is not within the scope of permitted church use or is not an accessory use under the Medford zoning ordinance."

ASSIGNMENT OF ERROR NO. 3

"Respondent erred in deciding that petitioner did not acquire a vested right to operate a school as a nonconforming use on church premises.

ASSIGNMENT OF ERROR NO. 4

"Respondent erred in prohibiting petitioner from operating a school without a conditional use permit while permitting another church in virtually identical circumstances to do so. Respondent thereby denies to petitioner the equal protection of the laws."[3]

Before responding to each assignment of error, the respondent makes a general argument opposing the petition. Respondent argues that its act was an attempt to enforce the zoning ordinance according to its plain terms, and this attempt did not become a "land use decision" within the meaning of Oregon Laws 1979, ch 772, as amended Oregon Laws 1981, ch 748, simply because petitioner sought exemption from enforcement before the city council. Respondent states the only application of its ordinance made in this proceeding was the city's statement that the ordinance in question read as it did. In other words, respondent argues that the resolution at issue was not a land use decision made pursuant to the city's ordinance, but a statement in writing of the meaning of the ordinance. The city characterizes the proceeding complained of as a denial of petitioner's claim that the ordinance could not be enforced against the petitioner. Respondent City states there is no statutory authority for LUBA to limit a city's statutory cause of suit to enforce its own ordinances.

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[3] This assignment of error is about Resolution 3950 and 4108 and the exemption granted the Open Standard Bible Church. We note the record of Resolutions 3950 and 4108 are not before us. We believe, therefore, we would not be able to "review" this allegation of error under Oregon Laws 1979, ch 772, sec 4, as amended by Oregon Laws 1981, ch 748, even if we were to find Resolution 4541 to be a "land use decision."

> "The city submits that had it exempted petitioner from enforcement of this ordinance, as petitioner sought, and a third party were dissatisfied with that result, the Board [LUBA] would have no jurisdiction to hear that party's petition that the city be ordered to enforce its ordinance. That petitioner has 'appealed' from the opposite result is a distinction without a difference. A Board decision on the merits for city in the instant proceeding would still leave city to seek judicial enforcement of its ordinances under ORS 30.315.[4] This contrived petition for review of an alleged land use decision should be found without Board subject-matter jurisdiction and dismissed." Brief of Respondent at 8.

In a reply brief, petitioner characterizes respondent's argument as to LUBA jurisdiction as two-fold. First, petitioner advises that respondent is asserting it merely enforced a plain and unambiguous zoning ordinance and, therefore, did not make a land use decision. To this assertion, petitioner argues Resolution 4541 was a "final decision made by a local government which applied several of respondent's zoning ordinance to the present situation." Reply Brief at 2.

Secondly, petitioner characterizes the city's argument as one announcing that the city simply refused to interpret its ordinance and, therefore, did not make a quasi-judicial decision. To this argument the petitioner responds that a quasi-judicial

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[4] ORS 30.315 provides

> "(1) an incorporated city or a county have a charter adopted pursuant to ORS 203.710 to 203.770 may, instead of penal enforcement maintain civil proceedings in courts of this state against any person to enforce requirements or prohibitions of its ordinances or resolutions when it seeks:
> "* * *
> "(c) To require or enjoin the performance of an act affecting real property;
> "(d) To enjoin continuance of a violation that has existed for 10 days or more; or
> "(e) To enjoin further commission of a violation that otherwise may result in additional violations of the same or related penal provisions affecting the public morals, health or safety."

decision is one which applied pre-existing criteria to a circumscribed factual situation. Citing *Strawberry Hill 4 Wheelers* v. *Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979). Petitioner claims the criteria in Section 10-165 of the Medford Code were applied in the present fact situation and reflected in the findings of fact and conclusions made in Resolution 4541.[5]

We agree that Resolution 4541 is not a land use decision but for somewhat different reasons than those advanced by the respondent. Resolution 4541 does nothing except declare what the city understands to be the meaning of terms in its own ordinance. Resolution 4541 does not deny or in any way affect application for a building permit or any other permit to construct, maintain or operate a school or any other use in the R-4 zone. It is advice to the applicant that if it wishes to continue operation of its school, it must apply for and receive a conditional use permit from the city. If the applicant refuses, the city can seek to enjoin continued use of the school in circuit court. The city, however, would have to prove in circuit court that the use was in violation of the zoning ordinance. The city's own determination the use was in violation of the ordinance would be of no effect.[6] In this sense, the determination is much like a city's determination that a person has a vested right. Once challenged, the city's determination means nothing. It has no force except that it provides guidance to the city in how

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[5] Section 10-165 of the Medford Code describes the various uses available in the R-4 zone.

[6] Under ORCP 79A, a party must show that he is entitled to relief before a temporary restraining order or injunction will be granted. The city, like any other entity seeking an injunction, must show that it is entitled to the injunction. A statement of the city's belief as to the meaning of its own code is not a judicially enforceable decree as to what the ordinance means. The city will have to prove what the ordinance means and that the church is in violation of the ordinance and "appeal" of the resolution and a declaration by this Board as to its validity will, therefore, have no effect on a circuit court determination pursuant to an injunction.

to proceed. See *Forman* v. *Clatsop County*, ___ Or LUBA ___ (LUBA No. 82-006, 1982).[7] The city's determination in this case about the church's use of the property for school purposes only provides guidance to the applicant as to what the city expects from the applicant. The determination may also provide guidance to the city in what action to take should the church not apply for a conditional use permit or cease operation of a school on the property. Determinations such as this which merely provide advice but do not in and of themselves affect the use of land are not land use decisions within the meaning of ORS 197.015(10).[8]

This matter is dismissed.[9]

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[7] Matters of vested rights and nonconforming use are determined in circuit court. See *Union Oil Company* v. *Clackamas County*, 5 Or LUBA 150 (1982), *Eagle Creek Rock Products* v. *Clackamas County*, 27 Or App 371, 556 P2d 150 (1976), rev den (1977); *1000 Friends of Oregon* v. *Bd. of Co. Comm. of Clackamas Co.*, 29 Or App 617, 564 P2d 1080 (1977) and *Eklund* v. *Clackamas Co.*, 36 Or App 73, 583 P2d 567 (1978).

[8] ORS 197.015(10) states:

"(10) 'Land use decision means:

"(a) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(A) The goals;

"(B) A comprehensive plan provision; or

"(C) A land use regulation; or

"(b) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals."

[9] See *Grant County* v. *Oregon Dept of Fish and Wildlife*, 1 Or LUBA 214 (1980), wherein we dismissed a challenge to a directive to the staff of the Fish and Wildlife Commission to secure a proposal for an exchange of property. We said the directive had "no effect on the use of land," and concluded that it was not a land use decision. See also, *Union Oil* v. *Clackamas County*, 5 Or LUBA 150 (1982).

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order of Dismissal for LUBA No. 82-010, on July 15, 1982, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

KAREN C. ALLAN
FOSTER & PURDY
P.O. Box 1667
Medford, OR 97501

WILLIAM J. SCHEIDERICH
Attorney at Law
411 W. 8th Street
Medford, OR 97501

Dated this 15th day of July, 1982.

JEANNE HUBBARD
Jeanne Hubbard
Secretary to the Board

MEDFORD CITY COUNCIL, RESOLUTION

RESOLUTION NO. 4541

A RESOLUTION adopting findings of fact and conclusions of law concerning application of section 10-165 and 10-235, Medford Code, to a compulsory-attendance school situated at 1108 West Main and numbers 25 and 29 Quince Street, Medford.

WHEREAS, the city council on January 7, 1982 held a public hearing to consider an appeal by the First Assembly of God

Church from the Medford Planning Commission's interpretation of the Medford Code so as to require a conditional use permit for operation of the church's school, the council makes the following findings of fact:

1. The First Assembly of God Church is now operating an elementary (primary) school meeting State of Oregon compulsory attendance requirements on church premises at 1108 West Main Street and in separate structures at 25 and 29 Quince Street, Medford, and has been operating that school since 1979. The school now includes grades one, two and three.

2. Prior to 1973, the church at 1108 West Main was a nonconforming use in C-2 zoning district. In 1973 the church sought and obtained City Council approval of a zone change to R-4 for the church premises at 1108 West Main and for additional property commonly known as 25 and 29 Quince Street, Medford. Plans and specifications for remodeling the church (ostensibly the reason for the zone change request), submitted to the city for site plan, and Architectural Commission review, made no mention of operation of a school on the described premises.

3. At all times since 1973, section 10-165, Medford Code, has listed a church as a permitted use and a "public, parochial [or] private school" as a conditional use within a R-4 zoning district.

4. First Assembly of God Church has not sought a conditional use permit for operation of the school nor change of occupancy permit for use of the structures at 25 and 29 Quince Street as a school, at any time since 1973 or before.

5. On January 17, 1980, the council by Resolution 3950 reversed the decision of the Planning Commission and allowed the operation of a school on premises of the Open Bible Standard Church at 2715 Table Rock Road, Medford (in a county RR-1 zoning district) without requiring that church to seek and obtain a modification of its original conditional use permit (granted for the church alone) so as to include operation of the

school. In this resolution, the council stated its finding, after public hearing, that ". . . the term 'church' as used in the Medford zoning ordinance includes a school meeting state compulsory attendance requirements operated as a part of the church ministry on the church premises. . . ."

6. On July 3, 1980, the council by Resolution 4103 reconsidered its prior resolution and determined "that the interpretation announced in Resolution 3950 should not be followed in the future"; instead, the council now resolves "that the zoning ordinance of the city of Medford shall be interpreted in accordance with the opinion in *Damascus Community Church v. Clackamas County,* and the interpretation announced in Resolution No. 3950 shall not be followed in the future. . . ."

7. The First Assembly of God Church did not act in reliance upon Resolution 3950 in continuing to operate and expanding the operation of its compulsory attendance school at Main and Quince Streets on January 17, 1980 and thereafter.

On these findings of fact the council makes the following conclusions:

8. Even though the church existed for many years before the school was started, the Church maintains that the school is an inseparable part of the ministry of the church. However, the interpretation and application of the zoning ordinance is independent of church doctrine. The term "church" as used in the zoning ordinance does not include a school meeting state compulsory attendance requirements. The school operated by the First Assembly of God Church at 1108 West Main and 25 and 29 Quince Street, Medford, in an R-4 zoning district is not an accessory use to the permitted use (the church) but is, instead, a separate and conditional use in that zoning district, requiring a conditional use permit for operation.

9. Operation of the school at 1108 West Main and 25 and 29 Quince Street, Medford, in 1979 or before or since without a valid conditional use permit for the school has been and continues to be an illegal use of those properties under the zoning ordinances then and now existing.

10. The city council Resolution 3950 did not operate to amend the existing zoning ordinance codified at section 10-165, Medford Code, and did not contemplate the First Assembly of God Church's operation of its school on its property at 1108 West Main and 25 and 29 Quince Street, Medford. Resolution 3950 did not make legal the pre-existing illegal operation of that school.

11. The First Assembly of God Church did nothing with regards to operation of its school following passage of Resolution 3950 such as to vest a right in the First Assembly of God Church to continue operation of that school after Resolution 3950 was rescinded by Resolution 4108.

12. The listing in section 10-165, Medford Code, of a church as a permitted use and a school as a conditional use, subject to conditional use permit, within an R-4 zoning district is not a law respecting the establishment of religion or prohibiting the free exercise thereof such as would violate the First and Fourteenth Amendments to the United States Constitution or any other United States or state of Oregon constitutional provision.

NOW, THEREFORE, BE IT RESOLVED THAT the appeal of the Planning Commission's interpretation of section 10-165, Medford Code, to require First Assembly of God Church to obtain a conditional use permit for operation of its compulsory attendance school at 1108 West Main and 25 and 29 Quince Street, Medford, be and same is hereby denied.

PASSED by the Council and signed by me in open session in authentication of its passage this 21st day of January, 1982.

ATTEST: /s/ Emily H. Kiebelman
EMILY H. KIEBELMAN
City Recorder

/s/ Al Densmore
AL DENSMORE
Mayor

CITY OF MEDFORD

Planning Department

October 20, 1981

Pastor Ravan
First Assembly of God Church
1108 West Main
Medford, Oregon 97501

Dear Pastor Ravan:

It has come to my attention that your church is operating a school on church property located at 1108 West Main, and that you are using the premises located at 39 Quince Street for Church activities.

The church and the school are located in an R-4 (High Density Multiple-Family Residential District). The church is a permitted use in the R-4 District, but Section 10-165(4,a) requires a Conditional Use Permit to operate a school. A search of city records indicates that you do not have a Conditional Use Permit to operate a school.

The facility located at 39 Quince Street is in an R-2 (Two Family Residential District) and would also require a Conditional Use Permit to be used for activities other than residential use. If it is your intention to continue these uses you must apply for a Conditional Use Permit. The application forms are available at the City Planning Department, Room 358, 411 West 8th St., Medford (City Hall). The fee for this type of application is $65.00.

It is hoped that with your awareness of this situation, we can rely upon you to contact this office in order to rectify this apparent oversight. As such land uses are subject to certain requirements, it is important that this matter be resolved. However, you should be made aware that failure to comply may result in the issuance of citations.

If you have any questions or desire further information regard-

ing this matter, do not hesitate to phone the undersigned at 776-7463.

Sincerely,

/s/ Keith E. Aeschliman
KEITH E. AESCHLIMAN
Code Enforcement Officer

KEA: jo

RESOLUTION NO. 4108

A RESOLUTION regarding future interpretation of the zoning ordinance with respect to church schools.

WHEREAS, on petition of the Open Bible Standard Church, the city council on January 17, 1980, adopted Resolution No. 3950, making the following findings:

1. That the term "church" as used in the Medford zoning ordinance includes a school meeting state compulsory attendance requirements operated as a part of the church ministry on the church premises; and

2. That such a school being operated by the Open Bible Standard Church is permitted under its origiral conditional use permit for a "church."

and,

WHEREAS, on April 28, 1980, the Court of Appeals of the State of Oregon decided the case of *Damascus Community Church v. Clackamas County,* 45 Or App 1065, in which the court held that an ordinance similar to Medford's would require a church to obtain a separate conditional use permit in order to operate a full-time parochial school on the church premises; and,

WHEREAS, the council had reconsidered its decision and determined that the interpretation announced in Resolution No. 3950 should not be followed in the future.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MEDFORD, OREGON, that the zoning ordinance of the city of Medford shall be interpreted in accordance with the opinion in *Damascus Community Church v. Clackamas County,* and the interpretation announced in Resolution No. 3950 shall not be followed in the future; provided, however, that the Open Bible Standard Church located at 2715 Table Rock Road shall continue to enjoy the privilege of operating its school, in its presently existing facilities only, as provided in Resolution No. 3950

PASSED by the Council and signed by me in open session in authentication of its passage this 3rd day of July, 1980.

ATTEST: /s/ Emily H. Kiebelman
EMILY H. KIEBELMAN
City Recorder

/s/ Al Densmore
AL DENSMORE
Mayor

RESOLUTION NO. 3950

A RESOLUTION reversing the decision of the Medford Planning Commission, and allowing the operation of a school from the Open Bible Standard Church facilities without the modification of the Conditional Use Permit granted to them in August, 1976; subject use occupies several parcels of property located at the northwest corner of Midway Road and Table Rock Road, within the RR-1 (County Rural Residential"One Acre Minimum Lot Size) zoning district.

WHEREAS, pursuant to Section 10-270, (9) and (10), Code of Medford, the city council of the city of Medford, at its regular meeting on January 3, 1980, considered an appeal from the decision of the Medford Planning Commission that in order to operate a school from their facilities, the Open Bible Standard Church must process a modification of the Conditional Use Permit granted to them in August, 1976; subject use occupies several parcels of property located at the northwest corner of Midway Raod and Table Rock Road, within the RR-1, County Rural Residential"one acre minimum lot size, zoning district; and,

WHEREAS, after having held a public hearing and considering all of the evidence presented by the appellant in support of its appeal, together with evidence in the record supporting the decision of the Planning Commission, and additional evidence pro and con, the city council found as follows:

1. That the term "church" as used in the Medford zoning ordinance includes a school meeting state compulsory attendance requirements operated as a part of the church ministry on the church premises; and

2. /That such a school being operated by the Open Bible Standard Church is permitted under its original conditional use permit for a "church."

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MEDFORD, OREGON:

Section 1. That the decision of the Medford Planning Commission that in order to operate a school from their facilities, the

Open Bible Standard Church must process a modification of the Conditional Use Permit granted to them in August, 1976, is reversed.

Section 2. That the city recorder is directed to deliver a copy of this resolution to the appellant as provided in Section 11-050 of the code of Medford.

PASSED by the Council and signed by me in open session in authentication of its passage this 17th day of January, 1980, effective nunc pro tunc to January 3, 1980.

ATTEST: /s/ Emily H. Kiebelman
EMILY H. KIEBELMAN
City Recorder

/s/ Al Densmore
AL DENSMORE
Mayor

Medford Zoning Ordinance

This appendix includes relevant portions of the Medford Zoning Ordinance.

10-115. *Definitions.* * * *

"* * * * *"

"Accessory structure of use shall mean a structure or use incidental and subordinate to the main structure or use of the same lot."

"* * * * *"

"Private School and Parochial School. Schools for children over the age of five years having a curriculum substantially equivalent to a public school."

"* * * * *"

10-165. *High Density Multiple-Family District, or R-4 District.*

"(1) Purpose. This district is intended to provide for high density multiple-family residential developments in locations close to shopping and services, transportion or public open space, and, in appropriate locations, a transitional use area between residential districts and other less restrictive districts.

"(2) Permitted uses. The following uses are permitted:

"* * * * *"

"(e) Churches subject to the requirements of Section 10-245.(5)."

"* * * * *"

"(3) Accessory uses. The following accessory uses are Permitted:

"* * * * *"

"(f) Other accessory uses and accessory buildings and structures *customarily appurtenant* to a permitted use,

but fences shall comply with Section 10-245 (19)." (Emphasis added)

"(4) Conditional uses. The following conditional uses may be permitted subject to a conditional use permit:

"(a) Public, parochial, and private schools, including child care facilities, but not including business, technical, or similar schools."

"* * * * *."

10-235. *Conditional Use Permits.*

"(1) Purpose. In certain districts, conditional uses may be permitted subject to the granting of a conditional use permit. Because of their unusual characteristics, or the special characteristics of the area in which they are to be located, conditional uses require special consideration so that they may be properly located with respect to the objectives of this code and their effect on surrounding properties."

"* * * * *."

10-260. *Nonconforming Uses.* "A use lawfully occupying a structure or site on the effective date of this code or of amendments thereto, which does not conform to the use regulations for the district in which it is located, shall be deemed to be a nonconforming use and may be continued, * * *."

"* * * * *."

10-275. *Appeals, General.* "In the event of an ambiguity in this code affecting enforcement thereof, the planning commission shall have power to declare the meaning and intent, and interpret the provisions, of this code. In thus resolving ambiguities on appeal, the planning commission shall so interpret the code as to carry out Section 10-105 and the expressed purpose of the zoning district involved.

"(1) Appeal to planning commission. Any appeal from a decision relating to the enforcement or interpretation of this code shall be made in writing, and shall be filed with the planning commission within 10 days after the decision. The

commission shall consider such appeal and render its decision within 60 days after the filing thereof. Any action of the planning commission interpreting any uncertainty or ambiguity shall be in the form of a resolution and shall be signed by the president or presiding member of the commission and filed with the city recorder.

"(2) Appeal to city council. In case an applicant is not satisfied with the action of the commission on his appeal, he may, within five days after the action of the planning commission, appeal in writing to the city council. The appeal procedure from the planning commission decision shall be as specified in Section 10-270, (9, 10).

"(3) Right of appeal. Except as otherwise specifically provided in the zoning ordinance, any order or determination made by the planning commission in the exercise of discretionary authority conferred by the zoning ordinance may be appealed to the city council by any person having a substantial interest in the subject matter of the order or determination, if such appeal is filed in accordance with this section; and, upon the perfection of the appeal, the procedure shall be the same as above set forth.

"(4) At the time of filing any notice of appeal authorized by Sections 10-220, (6), (d), 10-225, (4), 10-235, (6), 10-240, (8), 10-270, (9), 10-275, (2), or 10-280, (3), the appellant shall pay to the city treasurer an appeal fee in such amount as may be provided by general resolution of the city council. Pending the adoption of such a rate by general resolution, the fee for an appeal shall be 25.00."

An act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Minister and Vestry of the Protestant Episcopal Church of the town of Alexandria, in the District of Columbia, which was, on the first day of January, one thousand eight hundred and nine, associated as a religious society, be, and their successors are hereby, declared and made a body corporate and politic, by the name, style, and title, of the Minister and Vestry of the Protestant Episcopal Church of the town of Alexandria; and by the name, style, and title, aforesaid, they, and their successors, shall forever lawfully have, hold, use, and enjoy, all and every tract and tracts of land, already belonging to the said Church, which is now, or which may hereafter be, acquired by donation or purchase; the Church already built, with the burying ground belonging to the same, with their hereditaments and appurtenances; and all books and other property heretofore, and that may hereafter be, appropriated to the use of the said Church, to the sole and proper use and benefit of the said Church, agreeable to the true intent and meaning for which any of the said property was or may be purchased or given; and by the name, style, and title, aforesaid, they shall be capable in law to hold, maintain, and recover, all their estates, rights, and property, belonging thereto, and to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all suits, controversies, causes, actions, matters, and things, whether they be actions of debt, assumpsit, ejectment, trespass, or bill in chancery, in any court or courts of law or equity, and before any judge or justices whatsoever, and shall have one common seal and perpetual succession; and the service of process upon the churchwardens shall be a sufficient service upon the body corporate.

SEC. 2. *And be it further enacted*, That, in all proceedings of the aforesaid minister and vestry, all matters shall be decided by a majority of the votes; and the said minister shall in no case have a negative on the proceedings of the said corporation,

except when his vote shall be with, or make a majority of, the votes, present, at any meeting of the said corporation.

SEC. 3. *And be it further enacted*, That the said minister and vestry, by the name and style aforesaid, shall have good right, full power, and lawful authority to have, take, receive, acquire, purchase, hold, use, and enjoy, all lands, tenements, hereditaments, and all goods and chattels; and to demise, alien, improve, and lease, not only the lands which they now have, but which they may hereafter acquire; and to use and improve such goods and chattels, to the use and benefit of the said church, so that the annual increase thereof shall not exceed six thousand dollars, any law, usage, or custom, to the contrary notwithstanding. And it shall and may be lawful for the said minister and vestry of the said church, to sell any of the said property, real or personal, which at this time lawfully belongs to the said church, or the interest which the said church may have in any property, real or personal, or which may hereafter belong to it, for the purpose of applying the proceeds thereof to the purpose of erecting a new church, or repairing the present one, for the use of the said congregation or building, or repairing dwelling or other houses, for the use of their minister, or school houses, within the said town of Alexandria, or in any other way or manner as they shall, from time to time, think necessary for the benefit of the said church: *Provided*, That nothing in this act shall be construed so as to affect the rights or claim of any person or persons, county or parish, in or to any property now in possession of the said church, or claimed by it.

SEC. 4. *And be it further enacted*, That the minister, or in case of his absence, or of a vacancy, the churchwardens, shall call a meeting of the vestry as often as it shall be deemed necessary; seven of whom shall be a sufficient number to constitute a meeting for the dispatch of business, and shall have power (except for the election of a minister, or of demising, alienating, or leasing of land, in which cases, a concurrence of majority of the whole number elected shall be necessary,) to make such rules and orders, for the managing all the temporal affairs of the said church, as they, or a majority of them so met,

shall agree upon, and shall think most conducive to the interest and property of the said church, and shall have the disposition and ordering of all payments of the moneys belonging to the said church, and also of the appointment of a clerk, treasurer, collector, and sexton, whenever they judge it necessary, and the said clerk, treasurer, collector, and sexton, at their pleasure to remove, and appoint others in their stead; all which orders, rules, and appointments, together with the accounts of the said church, the said vestry shall cause to be fairly entered and preserved in well bound books, to be provided for that purpose; and shall deliver the said books, with the papers and documents belonging to the said church, over to their successors in office.

SEC. 5. *And be it further enacted*, That, whenever a minister and vestrymen are wanting, to form a body corporate and politic, agreeable to the direction of this act, it shall be lawful for any two reputable members of the church to call together, at the said church, by notice duly published in one of the newspapers published in the town of Alexandria, the members of the said church, and there elect, by a majority of votes, twelve able and discreet men, members of the said church, who shall be a vestry to all intents and purposes, and who, with their minister, or during a vacancy without a minister, shall be a body corporate and politic, by the same name, and shall enjoy all the rights, powers, privileges, and immunities, which are given by this act to the said church.

SEC. 6. *And be it further enacted*, That, at all elections of a vestry for the said church, no person shall be allowed to vote who is not a member of, and who has not actually contributed to the support of the said church, for twelve months next preceding the said election, There shall be elections of vestrymen every third year, forever, the next election to be held on Easter Monday next, and all succeeding elections on the same day, in every third year thereafter, which elections shall be held and conducted in the following manner: The members of said church shall assemble at the said church, or if there should be no church-house, at such other place as the vestry, for the time

being, shall appoint by due notice, on Easter Monday in every third year, and then and there elect twelve able and discreet men, members of the said church, as vestrymen, who shall continue in office for three years, and until their successors be elected, in the manner aforesaid; two of the vestrymen so chosen, shall, annually, by a majority of the vestry, be appointed churchwardens, who, or either of them, and their successors, shall preside at all elections of a vestry, shall take care that such elections are conducted in a fair and orderly manner, and shall be judges of the qualifications of the electors.

SEC. 7. *And be it further enacted*, That, whenever a vacancy or vacancies in the vestry shall happen, either by death, resignation, quitting the church, or removal, the remaining vestrymen, or a quorum of them, shall choose such person or persons as they may think fit and proper, to supply the office of such vestryman or vestrymen, who, in complying with the rules and forms of the said church, shall continue in office until the next general election, except he or they remove, resign, or quit the church as aforesaid.

SEC. 8. *And be it further enacted*, That it shall and may be lawful for the said vestry to make such provision for the support of the poor of the said church, as shall by them be thought proper; and to provide also, in such manner as to them shall appear proper, for the education of the poor children of the said church.

SEC. 9. *And be it further enacted*, That the vestry of the said church, two-thirds concurring, shall have full power and authority to remove from the said church any minister guilty of unworthy behaviour, or of neglecting the duties of his office; and, upon such removal, the said vestry shall have authority to elect a successor.

SEC. 10. *And be it further enacted*, That it shall and may be lawful for the said minister and vestry to make such rules and regulations, for the good management of the temporal affairs of the said church, as may be deemed by them most expedient, and for the government of the said vestry, and the same to

abrogate or alter as often as they shall see fit: *Provided always*, That such rules and regulations are not inconsistent with, and against any provision of this act, the laws of Congress, and the Constitution of the United States, or any rule or canon of the Protestant Episcopal Church of the State of Virginia.

SEC. 11. *And be it further enacted*, That this act shall commence, and be in force, from and after the passing thereof.

Veto message, February 21, 1811

To the House of Representatives of the United States:

Having examined and considered the bill entitled "An Act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia," I now return the bill to the House of Representatives, in which it originated, with the following objections:

Because the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates in particular the article of the Constitution of the United States which declares that "Congress shall make no law respecting a religious establishment." The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the minister of the same, so that no change could be made therein by the particular society or by the general church of which it is a member, and whose authority it recognizes. This particular church, therefore, would so far be a religious establishment by law, a legal force and sanction being given to certain articles in its constitution and administration. Nor can it be considered that the articles thus established are to be taken as the descriptive criteria only of the corporate identity of the society, inasmuch as this identity must depend on other characteristics, as the regulations established are in general unessential and alterable according to the principles and canons by which churches of that denomination govern themselves, and as the injunctions and prohibitions contained in the regulations would be enforced by the penal consequences applicable to a violation of them according to the local law.

Because the bill vests in the said incorporated church an authority to provide for the support of the poor and the education of poor children of the same, an authority which, being altogether superfluous if the provision is to be the result of pious charity, would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty.

Supreme Court, U.S.
FILED
NOV 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-538

In The
Supreme Court of the United States
October Term, 1985

MEDFORD ASSEMBLY OF GOD,

Petitioner,

v.

CITY OF MEDFORD, OREGON,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the free-exercise clause of the First Amendment require a City to exempt any parochial school located in the church building from a requirement for a conditional use permit under a zoning regulation governing the siting of all public and private school facilities?

2. Does a single instance of non-enforcement of such a regulation against a parochial school—for rational, non-suspect motives—entitle all other parochial schools to object to enforcement against them on equal protection grounds?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT

I. There is no significant conflict in the decisions of state courts of last resort 1

II. The Oregon Court of Appeals has not decided a constitutional issue of such importance to justify review by this court 4

III. The First Amendment Issue as presented is not ripe for decision 6

IV. The case was correctly decided and is consistent with prior decisions of this court and other federal courts 7

A. Free Exercise 7

B. Equal Protection 14

CONCLUSION 17

APPENDIX ..... App. 1

Testimony of David Hunt ..... App. 1

Medford Zoning Ordinance ..... App. 5

Testimony of James Eisenhard ..... App. 9

TABLE OF AUTHORITIES

Page

CASES:

American Communications Ass'n. v. Douds, 339 U.S. 382 (1950) 12

Braunfield v. Brown, 366 U.S. 599 (1961) 9

City of Concord v. New Testament Baptist Church, 118 N.H. 56, 382 A.2d 377 (1978) 2, 4

City of Sumner v. First Baptist Church, 97 Wn.2d 1, 639 P.2d 1358 (1982) 3, 4

Coe v. City of Dallas, 266 S.W.2d 181 (Tex. Civ. App. 1953) 11

Corporation of the Presiding Bishop v. City of Porterville, 338 U.S. 805 (1949) 12

Damascus Comm. Church v. Clackamas Co., 45 Or. App. 1065, 610 P.2d 273, *rev. denied* (1980), *app. dismissed*, 450 U.S. 902 (1981) 3, 4, 15

Fountain Gate Ministries v. City of Plano, 654 S.W. 2d 841 (Tex. Civ. App. 1983) 11

Grand Rapids v. Ball, — U.S. —, 87 L.Ed.2d 267 (1985) 13

Grayned v. City of Rockford, 408 U.S. 104 (1972) 14

Grosz v. City of Miami Beach, 721 F.2d 729 (11th Circuit 1983), *cert. denied* — U.S. —, 53 U.S.L.W. 3236 (1984) 12

Heard v. City of Dallas, 456 S.W.2d 440 (Tex. Civ. App. 1970) 11

Heffron v. International Society of Krishna Consciousness, 452 U.S. 640 (1981) 14

Jehovah's Witnesses v. Mullen, 214 Or. 281, 330 P.2d 5, 74 A.L.R.2d 347 (1958), *app. dismissed* 359 U.S. 436 (1959) 4

Johnson v. Robison, 415 U.S. 361 (1974) 9

TABLE OF AUTHORITIES—Continued

Page

Lakewood Cong. of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir., 1983), *cert. denied* — U.S. —, 52 U.S.L.W. 3262 (1983) 12

Lemon v. Kurtzman, 403 U.S. 602 (1971) 5, 13

Medford Assembly of God v. City of Medford, 72 Or.App. 333, 695 P.2d 1379 (1985) ..... *passim*

Meek v. Pittenger, 421 U.S. 349 (1975) 13

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 13

Oyler v. Boles, 368 U.S. 448 (1968) 15

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 13

Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293 (Alaska 1982) 3

Sherbert v. Verner, 374 U.S. 398 (1963) 10

St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981) 10, 13

Thomas v. Review Board, 450 U.S. 707 (1981) 10

United States v. Lee, 455 U.S. 252 (1982) 11

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 12

Wayte v. United States, — U.S. —, 53 U.S.L.W. 4319 (1985) 16

Williamson County Regional Planning Commission v. Hamilton Bank, — U.S. —, 53 U.S.L.W. 4969 (1985) 6

Wisconsin v. Yoder, 406 U.S. 205 (1972) 10

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTION:

First Amendment ..... *passim*
Fifth Amendment 6
Fourteenth Amendment 14

MEDFORD CODE:

Section 10-165(2) (c) 7
Section 10-165(4) 7
Section 10-235 7

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, except for the following inaccuracies and omissions:

1. Petitioner states that "For practical, financial, and philosophical reasons, the school could not survive off the church premises." Petitioner also states that "The sixteen students in the church school have a negligible land use impact, if any, when compared to the permitted church use" (Pet. 5). These are mere conclusions of an argumentative nature. No such findings were made by any tribunal below.

2. Petitioner states that the Medford City Council adopted Resolution No. 4541 on January 21, 1981. The actual date of adoption was January 21, 1982. (The correct date appears at the end of the document reproduced in Petitioner's appendix at 51a.)

3. While Respondent does not question Petitioner's statement that its school is "an integral and inseparable religious ministry of the church" (Pet. 5), it should also be noted that the beliefs of the church do not require members to send their children to the church school. (App. 1.)

4. Petitioner's is not the only church school in Medford required to have a conditional use permit. Thirteen other churches in Medford have schools on their church premises. Nine of these have conditional use permits granted by the city. Three are legal nonconforming uses. The other is the Open Bible Church mentioned in Resolutions No. 3950, 4108 and 4541. *See opinion below*, footnote 5. (Pet. 11a).

5. The church conceded that obtaining a conditional use permit "would not change our curriculum or quality of our operation at all" (App. 4).

REASONS FOR DENYING THE WRIT

I. There is no significant conflict in the decisions of state courts of last resort.

Petitioner attempts to show a conflict between the courts of New Hampshire and Washington, said to support Petitioner, versus Alaska and Oregon. Close examination of the issues and holdings in these cases does not reveal a serious conflict.

City of Concord v. New Testament Baptist Church, 118 N.H. 56, 382 A.2d 377 (1978) was not decided on constitutional grounds. The issue was whether a zoning ordinance which allowed "facilities usually connected with a church" also allowed a church school without a special exception. The New Hampshire court held that a school was a facility usually connected with a church, largely for historical reasons. The court pointed out that education was a responsibility shouldered by churches long before the states began operating public schools, 382 A.2d 377, 379. While the possibility of a First Amendment problem was a factor influencing the interpretation of the ordinance, the New Hampshire court did not hold that a different interpretation would have been unconstitutional.

Unlike the Concord ordinance, the Medford ordinance specifically makes schools a conditional use. Thus, the Oregon court did not have to determine if a school is usually connected with a church. *Medford Assembly of God v. City of Medford*, 72 Or. App. 333, 335, 695 P.2d 1379 (1985). Since the Medford ordinance as interpreted by the Oregon court does not require the city authorities to define the limits of religious activities, it does not present the same potential for infringement of free-exercise rights

as the New Hampshire court found in the Concord ordinance. *See also Damascus Comm. Church v. Clackamas Co.*, 45 Or. App. 1065, 1072, 610 P.2d 273, *rev. denied* (1980), *app. dismissed* 450 U.S. 902 (1981).

The other case relied on by Petitioner as evidence of conflict, *City of Sumner v. First Baptist Church*, 97 Wn.2d 1, 639 P.2d 1358 (1982), also fails to present a direct conflict with the Oregon decisions. The *Sumner* case did not hold that the City of Sumner's special use permit requirement violated the free-exercise clause. The case was remanded to the trial court for further proceedings. On remand, it appears that the city would be required to justify its denial of the special use permit sought by the church and the trial court would have to "balance the interests of the parties". *Sumner, supra*, 639 P.2d 1358, 1362. We do not know the outcome of the balancing.

The City of Medford has not denied Petitioner a conditional use permit for its school. The church has never applied for the permit, because it claims it should be totally exempt from the permit requirement. There is no reason to believe a permit would be denied if the church applied for it. The city has invited the church to apply (Pet. 52a). Naturally, denial of a permit calls for stricter scrutiny than a claim that a permit requirement is unconstitutional. *See Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1298 (Alaska 1982).

It also should be noted that the *Sumner* court was divided. Four justices signed the opinion of the court. One concurred separately. Two concurred in the result only. Two dissented. Only five of the nine members of the Washington court agreed with the "rigorous stand-

ards suggested by the majority". 639 P.2d 1358, 1366 (concurring opinion of Justice Williams).

The *Concord* and *Sumner* cases do not present a direct conflict with the Oregon and Alaska decisions on free exercise of religion. While there is some divergence in the approach taken by these state courts, it has not been shown that there is a serious national problem in dealing with zoning of church schools. Furthermore, the Oregon decisions are consistent with decisions of the federal courts in similar cases (*See infra* Sec. IV). Certiorari is granted only for "special and important reasons". The conflict, if any, does not rise to that level.

II. The Oregon Court of Appeals has not decided a constitutional issue of such importance to justify review by this court.

The constitutional issue in this case is not significantly different from that raised in *Damascus Comm. Church v. Clackamas Co., supra,* in which this Court dismissed an appeal for want of a substantial federal question. In 1959 this Court likewise dismissed an appeal in a case upholding a city council denial of a "special use" permit (same as "conditional use" permit) to construct a church in a residential zone. *Jehovah's Witnesses v. Mullen,* 214 Or. 281, 330 P.2d 5, 74 A.L.R.2d 347 (1958), *app. dismissed* 359 U.S. 436 (1959).

Petitioner's resurrection of President Madison's veto of the church incorporation bill adds no substance to the petition. It is one thing for the legislature to create a religious society and prescribe rules for its governance and yet another to grant a church permission to make a particular use of its land. The suggestion that the grant-

ing of a conditional use permit would amount to an establishment of religion is absurd, to say the least. The permit requirement easily passes the establishment clause test enunciated by this Court. The test requires that the law must (1) have a secular purpose, (2) have no primary effect of advancing religion, and (3) not create excessive entanglement between church and state. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The ordinance's purpose is to regulate the siting of public and private schools—a clearly secular purpose. The granting of a permit would advance religion only incidentally, if at all. The decision on the permit is based on non-religious land use concerns. City officials are not otherwise involved in the operation of the church. Therefore, there is no significant entanglement. Not only is the establishment clause argument clearly without merit, it also was not raised in the state court. This foray into history does not demonstrate that the Oregon court decided a novel and important question of federal constitutional law.

Petitioner claims that the number of churches with on-premise schools is growing rapidly and that cases similar to this one "will arise in many more states". However, Petitioner offers no evidence to support this assertion. Perhaps this is nothing more than an indication that the Concerned Women for America Education & Legal Defense Foundation intends to foster such litigation. If more such cases do arise, the Court will have the benefit of further exploration of the issues by other state and federal courts. At this time, there is no urgent need for consideration of the church school zoning issues by this Court.

III. The First Amendment issue as presented is not ripe for decision.

The present case involves a recently-started school which few members' children attend, attendance not being required by the tenets of the faith. The church has not even applied for a permit. If the permit were applied for and granted, there would be no controversy. There is no reason to believe that the church could not obtain what it desires simply by exhausting its administrative remedies. Even if the permit were ultimately denied, it would not prevent the church from applying for and receiving a permit for a school in a different location. After all, nine other church schools in Medford have applied for and received conditional use permits. The record does not indicate that any have ever been denied.

As recently as last term, this Court has indicated its reluctance to review certain cases involving the application of land use regulations until all administrative remedies have been exhausted. *Williamson County Regional Planning Commission v. Hamilton Bank*, — U.S. —, 53 U.S.L.W. 4969 (1985). In *Williamson*, the Court indicated that Fifth Amendment "taking" claims require examination of the economic impact of the government action compared with reasonable investor expectations. The court found that

> Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. — U.S. —, 53 U.S.L.W. at 4974.

A similar problem is presented here. Petitioner asks the Court to *assume* that a permit would be denied without any

compelling state interest to justify the denial. It is simply impossible to tell if a permit denial would be justified under this standard unless Petitioner applies for the permit and gives the city an opportunity to consider the application on its merits. If certiorari is granted, the Court should not go beyond consideration of the facial validity of the permit requirement. The particular circumstances of Petitioner's church and school should not be considered by this Court unless and until a permit application is filed and the city has determined how the ordinance will be applied.

IV. The case was correctly decided and is consistent with prior decisions of this court and other federal courts.

A. Free Exercise

Section 10-165(2)(c) of the Medford zoning ordinance classifies Petitioner's church as a permitted use in the R-4 zoning district. Section 10-165(4) classifies "public, private and parochial schools" as conditional uses in the R-4 zone Section 10-235 of the zoning ordinance provides that conditional uses may be permitted subject to the granting of a conditional use permit by the planning commission. The latter section expresses the city council's legislative judgment that:

> Because of their unusual characteristics, or the special characteristics of the area in which they are to be located, conditional uses require special consideration so that they may be properly located with respect to the objectives of this code and their effect on surrounding properties.

Section 10-235, Medford Code.

The Medford City Council, the Oregon Land use Board of Appeals and the Oregon Court of Appeals have all in-

terpreted these ordinance provisions to require a conditional use permit for a church school, even though the school is located in the church building in the R-4 zone where "churches" are a permitted use. Petitioner has refused to apply for a conditional use permit for its school and contends that the permit requirement violates the free-exercise clause of the First Amendment. The essence of Petitioner's argument is that, because the school is on the church premises and is an integral part of the ministry of the church, the permit requirement imposes a heavy burden on its religious practices, unjustified by any compelling state interest.

Respondent does not question the church's contention that the school is an integral part of the ministry of the church. It is clear that the school is one means used by the church to propagate the faith. However, there is no evidence in the record that the tenets of Petitioner's faith require that the school be located on the church premises. The church simply finds it convenient to have the school there. The church has an average Sunday attendance of 700 persons, but the school has only 16 students. This disparity is apparently explained by the fact that the beliefs of the church do not require its members to send their children to the church school and that the church has no quarrel with the public school system.

Petitioner does not appear to be concerned about the *process* of applying for a conditional use permit and there is no reason to believe that it would not receive fair and equitable treatment. Since the city has granted nine CUPs for church schools and denied none, the church would seem to have nothing to fear. Since the church wouldn't apply for the permit, the city has not had an

opportunity to properly apply the factors governing issuance of the permit to this particular situation. Petitioner can only contend that the mere *possibility* of denial of the permit, no matter what land use problems might surface in the permit process, is an impermissible burden on its First Amendment rights.

With the foregoing summary of the positions of the parties, it is plainly seen that the First Amendment issue in this case is really quite narrow. The city is not trying to tell the church what to teach or what kind of ministries it should have. The city is merely trying to allow schools and churches in residential neighborhoods while at the same time retaining some control to allow it to protect the neighborhood from a use that may be incompatible. Thus it is clear that the ordinance passes the "threshold test", because it has a secular purpose and effect and regulates conduct only, not beliefs. Any effect on religion is only an incident of the secular effect of regulating the siting of all schools. *Braunfield v. Brown,* 366 U.S. 599 (1961) (sustaining Sunday closing law challenged by an Orthodox Jew).

Beyond this threshold, the government interest must be balanced against the burden on religion. However, this balancing need not be difficult where a religion based exemption would clearly and substantially impair the government's policy objectives and the burden on religion is minor. *Braunfield v. Brown, supra, Johnson v. Robison,* 415 U.S. 361 (1974) (sustaining denial of veterans benefits to conscientious objector who performed alternative civilian service). On the other hand, a law which compels people, under threat of criminal penalties or life-

threatening economic sanctions, to perform acts directly contrary to fundamental beliefs can be justified only if the government can demonstrate a very strong interest in taking such action. *Wisconsin v. Yoder,* 406 U.S. 205 (1972), *Sherbert v. Verner,* 374 U.S. 398 (1963), *Thomas v. Review Board,* 450 U.S. 707 (1981).

In this case, the burden of the conditional use permit on the practice of religious beliefs is light. The church believes in parochial education as a desirable thing, not a necessity for all of its members' children. It is convenient, but not necessary, to have the school on church premises rather than elsewhere. Certainly the church believes very strongly that its rights are violated by the permit requirement, but this must be viewed as a political and legal opinion rather than a religious belief.

The burden on the city of granting a religion-based exemption is intolerable if the city is to preserve its legislative objectives. There can be no doubt that most, if not all, churches that operate parochial schools regard them as an integral part of the ministry of the church. *See, e.g., St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772 (1981).

Thus, in pursuing its objective of regulating the siting of schools, the city would (if such exemptions are required) have to assume that any church at any time could operate a parochial school of any size on the church premises. As the city planning director pointed out (App. 9) this would leave the city with a difficult policy choice. It would have to either abandon the control of siting of schools or enact greater restrictions on the siting

of all churches. In fact, the city's dilemma would be even worse, for there is no principled way to distinguish between a request for a religion based exemption for a "school ministry" and a request for exemption for any other activity which a church might believe it should conduct on its church premises. For example, Texas courts have considered and rejected claims that certain church "ministries" were "accessory uses" of church property: *Fountain Gate Ministries v. City of Plano,* 654 S.W.2d 841 (Tex. Civ. App. 1983) (college adjacent to a church), *Heard v. City of Dallas,* 456 S.W.2d 440 (Tex. Civ. App. 1970) (kindergarten in a rectory), *Coe v. City of Dallas,* 266 S.W.2d 181 (Tex. Civ. App. 1953) (healing center). Churches are commonly known to operate hospitals, radio and television stations and many other diverse types of activities as part of their ministry. If a religion-based exemption is constitutionally required for a school ministry, there can be no doubt that churches everywhere will be entitled to religion-based exemptions for these other activities.

The situation presented in this case is similar to that in *United States v. Lee,* 455 U.S. 252 (1982) where the Court said:

> There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system would not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that vio-

> lates their religious belief. (Citations omitted.) Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

455 U.S. 252, 260. Likewise, the zoning scheme could not function if churches are entitled to religion based exemptions for all their "ministries", regardless of the zoning regulations for the area where the churches are located. The protection of its neighborhoods through zoning has long been recognized as a vital interest of local government. *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). Therefore, it is clear that the balance should tip in favor of the city in this case.

Recently, two federal circuit courts have upheld local zoning ordinances excluding churches from residential areas against free exercise clause challenges. *Lakewood Cong. of Jehovah's Witnesses v. City of Lakewood,* 699 F.2d 303 (6th Cir. 1983), *cert. denied* — U.S. —, 52 U.S. L.W. 3262 (1983), *Grosz v. City of Miami Beach,* 721 F.2d 729 (11th Circuit 1983), *cert. denied* — U.S. —, 53 U.S. L.W. 3236 (1984). Both these cases involved much greater restrictions on churches than Medford imposes through its requirement for a conditional use permit. In *Grosz,* the court found support for its decision in the Supreme Court dismissal for want of a substantial federal question in *Corporation of the Presiding Bishop v. City of Porterville,* 38 U.S. 805 (1949), where the state court had held that churches may be excluded from residential areas. In a later case, *American Communications Ass'n. v. Douds,* 339 U.S. 382, 397 (1950), the *Porterville* case was explained as follows:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

Petitioner cites several cases as authority for its assertion that a church school cannot be regulated separately from its parent church. Examination of these cases reveals that this Court has not adopted such a rule. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Grand Rapids v. Ball*, — U.S. —, 87 L.Ed.2d 267 (1985) were establishment clause cases dealing with government aid to parochial schools. In *Lemon* the Court acknowledged that "building and zoning regulations" are examples of "necessary and permissible contacts" between church and state. 403 U.S. at 614. The other cases relied on by Petitioner, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) were statutory interpretation cases not directly involving First Amendment issues.

Petitioner also relies on *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), which struck down a zoning ordinance that totally excluded all forms of live entertainment from the borough. The ordinance was held to be an unreasonable restriction on free speech because it totally banned a legitimate form of expression, unjustified by any substantial government interest. The Medford ordinance

bears no resemblance to that of Mt. Ephraim. This Court has held that a law may impose restrictions on the time, place and manner of the exercise of First Amendment rights if the restrictions (1) are not based on the content or subject matter of the speech, (2) serve a significant governmental interest, and (3) leave open alternative forums for communication. *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640 (1981), *Grayned v. City of Rockford,* 408 U.S. 104 (1972). Medford's zoning regulation is not based on content of speech. Church schools are regulated if they are the functional equivalent of a public school, regardless of the doctrines they teach. A distinction between a public school or its equivalent and a Sunday school is not a regulation of content of speech. The ordinance serves an important governmental interest by assuring that operation of a school in a residential area will not adversely affect the area. There is no absolute prohibition of or undue restriction of the exercise of protected rights. The evidence does not show that the ordinance has had the effect of severely restricting locations for parochial schools. Thus the ordinance qualifies as a reasonable regulation of the time, place and manner of the exercise of Petitioner's rights. Petitioner seems to be upset that the Oregon court did not discuss its free exercise arguments at length. This is no reason for granting a writ of certiorari in a case where the result reached is plainly correct.

B. Equal Protection

Before Petitioner's case came to its attention, the Medford City Council had occasion to consider a similar appeal from the Open Bible Church. Misled by a lower

court decision in another part of the state, the council erroneously granted an exemption to the Open Bible Church via an incorrect interpretation of its ordinance. This council action was never appealed, but the lower court decision relied upon was appealed, and was reversed. *Damascus Community Church v. Clackamas Co.*, 45 Or.App. 1065, 610 P.2d 272, *rev. denied* (1980), *App. dismissed* 450 U.S. 902 (1981). This led the council to resolve not to make the same mistake *again*, though it let stand the exemption granted to the Open Bible Church. This sequence of events is set forth in detail in the appendix to the Petition. Petitioner argues that this single prior instance of non-enforcement of the conditional use permit requirement precludes the city from enforcing it against Petitioner, and thus necessarily precludes enforcement against any other church.

Petitioner's argument is at odds with the decisions of this court concerning selective enforcement. In *Oyler v. Boles*, 368 U.S. 448 (1968), the Court sustained a conviction under a habitual offender statute against a selective enforcement challenge. The Court found that:

> Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a denial of equal protection were not alleged.

368 U.S. at 456.

Just last term, the Court upheld selective prosecution of draft resisters, finding neither a discriminatory effect

nor discriminatory intent. *Wayte v. United States,* — U.S. —, 53 U.S.L.W. 4319 (1985). In this case, Petitioner has failed to present any evidence of arbitrary discrimination. Not wishing to revoke an exemption granted in a quasi-judicial proceeding, the council had a rational, non-discriminatory basis for treating its prior action as *res judicata*—even though the exemption clearly had been granted in error. Even if this decision is subjected to the "strict scrutiny" that Petitioner requests, it is nevertheless a reasonable choice. The Oregon Court of Appeals found that the City had a significant governmental interest in acting as it did:

> The city, nevertheless, has a continuing interest in encouraging proponents and opponents of zoning actions to use the ordinance's declaratory interpretation procedure. That interest is served by the city's adherence to Resolution No. 3950 as it applies to the particular church whose invocation of the procedure resulted in the adoption of the resolution; the city has no comparable interest in misapplying its ordinance in accordance with Resolution No. 3950 to another church that did not intiate the declaratory proceeding that culminated in that resolution and which later initiated the declaratory proceeding involved in this appeal after the city had disavowed the interpretation contained in Resolution No. 3950.

Medford Assembly of God v. City of Medford, 72 Or.App. 333, 340 (1985). The court below further stated that:

> We assume only for purposes of discussion that some constitutionally cognizable classification is involved here. However, it is just as arguable that all that is involved are different resolutions of different controversies under different legal standards that were understood to be controlling at the time of the decisions. Both the adoption of Resolution No. 3950 and of the later resolution repeating it could have been appealed,

> to LUBA. (Citation omitted.) Had either resolution been tested in that way, the ordinance presumably would have applied in the same way to both organizations or a legal, as opposed to rational, basis for differentiating between them would have been enunciated. Viewed in that perspective, the difference in treatment here might be better characterized as two applications of the ordinance—one of which was arguably erroneous and appealable—than as a classification giving rise to equal privileges and equal protection analysis.

Id. at 340, footnote 7. Though the court below felt that "strict scrutiny" did not apply, it is clear from the foregoing that it did scrutinize the city's actions very carefully. It is difficult to see how the "strict scrutiny" test could require more than this. By any standard, the distinction between the two churches is justified.

CONCLUSION

Since there is no significant conflict among state courts and the Oregon decision clearly comports with federal constitutional standards, the writ should be denied.

Respectfully submitted,

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Date: November 15, 1985

APPENDIX

TESTIMONY OF DAVID HUNT ON BEHALF OF MEDFORD ASSEMBLY OF GOD CHURCH AT THE MEDFORD CITY COUNCIL HEARING ON JANUARY 7, 1982.

HUNT: Mr. President and members of the council. My name is David Hunt and I reside at 2917 Comice Drive in the southeast portion of Medford and I presently am serving in a position on the church board. I am secretary of that board. I also serve in the capacity of chairman of New Dimension Advisory Board, that makes up the board of the school and serves in an advisory position to our church board. I don't know if I can not duplicate as I have memorized it so I don't know if I can—(laughter) We really do feel though the church is obligated to provide quality education that is built upon the foundation of Biblical content. We really feel that being able to do this that we have a real positive force in this community and the result that the students will have when they go through the schooling and the educational material that we offer in our ministry of this school. We feel that this school, New Dimension which includes the day care and kindergarten, preschool, first, second and third grades, that children that go through this educational system will come out of it with values that are positive forces within this community. I would like to make that point. Christian values learned is a real positive force in our community. I will make it clear that the church is not fighting against the public school system. Many of our church members have children enrolled in the public school system and it is a fine system and we are not fighting that—that battle

at all, we believe in it also. There is, however, a difference in educational systems. In curriculum that we use that is Bible-based, values that are taught are based upon the values that you find in Scripture. Another positive thing that we feel is in our educational system is the student-teacher ratio. As was mentioned, third grade containing three students, the student-teacher ratio is very low as compared to the public schools. We feel that this is a real quality plus for our type of system.

So far mentioned tonight has been the different educational systems, public, private, parochial, church school. We would like to make it clear that we consider ourselves as a Christian church school and there are differences which have already been talked about. We feel real positive that the church in offering this ministry is offering a program of alternative education, very important and we feel that it is our obligation based upon the Bible and based upon the Scripture that we offer this as part of our ministry. I would also like to make a point of clarification here too, perhaps some of you believe that the buses that have caused such a controversy are used in the school. The buses are not used in New Dimension in any way. I would qualify that by saying that perhaps there was an outing to a park, they could be loaned to New Dimension. They are not served to bus students to New Dimension. Our school program is a tuition-supported and church-subsidized program. I would like to emphasize that because tuition alone does not pay for the program of New Dimension. It can only survive upon the subsidy part that the church also involves itself in financially.

Presently the New Dimension employes 11 persons. We have 6 full time people and we have 5 part time people.

Totally in this school year the most that we have had in our New Dimension, totally in all areas is 144 children. I would like to bring out a fact that that as compared with the school year of 1979-1980 is lower as we had a total of 152 children. I'll briefly give you a breakdown of where the students are within the school. If you add these totals up you will come up with more than the 144 and the reason for that is because some that are enrolled in day care and some that are enrolled in pre-school are the same students, different hours of the day. We have 103 in day care, we have 52 enrolled in preschool, we have 15 in kindergarten, we have 16 students enrolled in our elementary school. In summary, in closing I would just like to say that we really believe that our purpose is to build upon the foundation of Biblical context, Biblical context, walls of quality education. You each live in a home, you each have walls that provide some type of safety to you. We fell that in our church program that we can be a wall of quality education to serve as a protection to the children we have who go out and serve and live in the community.

Any questions?

Yes.

Bill.

Mr. Hunt, do you believe that we as this government level have absolutely no interest whatsoever in your curriculum, in what you teach, how you teach it, how many students you have, so on and so forth and do you feel that a conditional use permit is a threat to the church's educational system?

HUNT: Well, that's more than one question. Let me see if I can cover it all, two questions. First of all, I be-

lieve that each member on the city council are very highly concerned about every area in this community and I think by and large the majority of the members of our church realize that and appreciate it. Secondly, regarding the conditional use permit—

This is in relation—in other words, the conditional use permit has absolutely nothing to do with the educational facilities, how you teach and what you teach in your church —do you feel it is in any way, shape or form a threat to your school system?

HUNT: Okay. I would say that the conditional use permit would not change our curriculum or quality of our operation at all. Do I feel threatened by a conditional use permit? I feel that by saying that we have been operating illegally from the onset is certainly a threat to our morals, our stated purpose in this community.

All right, thank you.

10-235. *Conditional Use Permits.*

(1) Purpose. In certain districts, conditional uses may be permitted subject to the granting of a conditional use permit. Because of their unusual characteristics, or the special characteristics of the area in which they are to be located, conditional uses require special consideration so that they may be properly located with respect to the objectives of this code and their effect on surrounding properties.

(2) Planning commission authority. The planning commission shall have the authority to approve, approve with conditions, disapprove, or revoke conditional use permits subject to the provisions of this section. Changes in use, expansion, or contraction of site area, or alteration of structures or uses classified as conditional and existing prior to the effective date of this code shall conform to all regulations pertaining to conditional uses.

(3) Application. A property owner or any interested person may make application for a conditional use permit which shall be made to the planning commission in the manner prescribed by the city. Such application shall be accompanied by a legal description of the property affected, site plans as set forth in Section 10-255(3a), and an application fee in the amount established by general resolution of the city council. Pending the adoption of such a resolution, the fee shall be $50.00. No part of the fee shall be refundable.

(4) Public hearings. Before a conditional use is permitted the proposed conditional use shall be considered by the planning commission at a public hearing. Notice of

said hearing shall be given as provided in Section 10-270 (2, 3, 4).

(5) Action by the commission. The planning commission may approve, approve with conditions, or disapprove the application for a conditional use permit. In permitting a conditional use the planning commission may impose, in addition to regulations and standards expressly specified in this code, other conditions found necessary to protect the best interests of the surrounding property or neighborhood, or the city as a whole. These conditions may include requirements increasing the required lot size or yard dimensions, increasing street widths, controlling the location and number of vehicular access points to the property, increasing the number of off-street parking or loading spaces required, limiting the number of signs, limiting the coverage or height or buildings because of obstructions to view and reduction of light and air to adjacent property, limiting or prohibiting openings in sides of buildings or structures or requiring screening and landscaping where necessary to reduce noise and glare and maintain the property in a character in keeping with the surrounding area, and requirements under which any future enlargement or alteration of the use shall be reviewed by the city and new conditions imposed. The planning commission may also require architectural approval for any conditional use in any district if it finds that such approval is necessary in any particular situation to accomplish the purposes and objectives of this code.

(a) In order to grant any conditional use, the planning commission must find that the establishment, maintenance, or operation of the use applied for will not, under the circumstances of the particular case, be detrimental to the health, safety, or general welfare of

persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to the property and improvements in the neighborhood or to the general welfare of the city.

(b) The planning commission shall render a decision within 60 days after the filing of the application. The decision of the planning commission shall be final unless appealed to the city council.

(c) A conditional use permit shall become void after one year after approval, or after such greater or lesser time as may be specified as a condition of approval, unless within that time the required building construction, alteration, or enlargement has been commenced an diligently pursued or, if no such construction, alteration, or enlargement is required, unless the permitted activity is being regularly conducted on the premises. The planning commission may extend the permit for a period of one year.

(6) Appeal. The applicant or any interested person may appeal a decision of the planning commission to the city council in the form prescribed by the city. The appeal procedures shall be as set forth in Section 10-270(9, 10).

(7) Effect. No building or other permit shall be issued in any case where a conditional use permit is required by the terms of this code until five days after the approval of the conditional use by the planning commission. An appeal from an action of the planning commission shall automatically stay the issuance of a building or other permit until such appeal has been completed.

(8) Violation of condition. The planning commission, on its own motion, may revoke any conditional use permit for noncompliance with conditions set forth in the granting of said permit after first holding a public hearing and giving notice of such hearing as provided in Section

10-280(3). The foregoing shall not be the exclusive remedy, and it shall be unlawful and punishable hereunder for any person to violate any condition imposed by a conditional use permit.

(9) Limittaion on new applications. In a case where an application is denied by the planning commission, or denied by the city counsel on appeal from the planning commission, unless specifically stated to be without prejudice, it shall not be eligible for resubmittal for the period of one year from the date of said denial unless, in the opinion of the planning commission, new evidence is submitted or conditions have changed to an extent that further consideration is warranted.

(10) Notification of action. The planning commission shall notify the applicant for a conditional use in writing of the planning commission's action within seven business days by postmark date after the decision has been rendered.

A PORTION OF THE TESTIMONY OF JAMES M. EISENHARD, CITY PLANNING DIRECTOR, AT THE CITY COUNCIL HEARING ON JANUARY 7, 1982.

EISENHARD: I think the general answer to that is that we feel, and the zoning ordinance recognizes, that a church in a traditional sense and a school have different land use impact and therefore we feel that by being able to regulate them separately we can help, in fact, help church schools to be good neighbors by making suggestions in the form of conditions at the time of permit review so that they don't become a problem in a neighborhood. If all churches, in fact, chose to have schools we would have a different kind of zoning ordinance and churches would be allowed in different places than they are allowed now and they wouldn't be allowed in some places where they are allowed now just as many other uses are not allowed in some places.